Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

B.C. FOREMAN, IDA CLARK, OTIS TARVER, DOMINIC DE LA CRUZ, LOUIS DAVIS, and MANDY PESINA,

Appellants,

v.

DALLAS COUNTY, TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, Dallas County Judge; JIM JACKSON, JOHN WILEY PRICE, MIKE CANTRELL, and KENNETH MAYFIELD, Dallas County Commissioners; and BRUCE SHERBET, Elections Administrator of Dallas County, Texas,

Appellees.

On Appeal From The United States District Court For The Northern District Of Texas

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. UNDER SECTION 5 OF THE VOTING RIGHTS ACT, MUST A COVERED JURISDICTION SUBMIT FOR PRECLEARANCE TO EITHER THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA OR TO THE ATTORNEY GENERAL CHANGES IN THE METHOD OF SELECTING ELECTION OR POLL JUDGES, WHERE SUCH JUDGES PERFORM A PUBLIC ELECTORAL FUNCTION THAT DIRECTLY AFFECTS VOTERS?

2. WHETHER THE LOCAL THREE-JUDGE DISTRICT COURT EXCEEDED ITS JURISDICTION IN A SECTION 5 ENFORCEMENT ACTION BY REVIEWING THE MOTIVE FOR THE JURISDICTION'S VOTING CHANGES AND EXEMPTING THOSE CHANGES FROM THE PRECLEARANCE REQUIREMENTS BECAUSE THE COURT BELIEVED THE CHANGES WERE MOTIVATED BY PARTISAN CONCERNS RATHER THAN RACIAL DISCRIMINATION?

3. WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE ATTORNEY GENERAL'S PRECLEARANCE OF A 1985 RECODIFICATION AND AMENDMENT TO THE TEXAS ELECTION CODE IMPLICITLY PRECLEARED DALLAS COUNTY'S CHANGES IN THE PROCEDURES USED TO SELECT ELECTION JUDGES?

4. WHETHER A SECTION 5 COVERED JURISDICTION, WHICH HAS IMPLEMENTED A SERIES OF UNPRECLEARED VOTING STANDARDS, PRACTICES OR PROCEDURES, MAY RETURN, AGAIN WITHOUT

QUESTIONS PRESENTED

PRECLEARANCE, TO THE STANDARDS, PRACTICES OR PROCEDURES IN EFFECT AT THE TIME OF THE ORIGINAL COVERAGE DATE OF THE VOTING RIGHTS ACT?

5. WHETHER THE DISTRICT COURT ERRED IN REFUSING TO ENJOIN CHANGES IN VOTING STANDARDS, PRACTICES OR PROCEDURES THAT HAD NOT RECEIVED PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT?

PARTIES

Actual parties to the proceedings in the United States District Court were:

(1) B.C. Foreman, Ida Clark, Otis Tarver, Dominic De La Cruz, Louis Davis, and Mandy Pesina, plaintiffs, appellants, herein,

(2) Dallas County, Texas, a political subdivision of the State of Texas, defendant,

(3) Commissioners Court of Dallas County, Texas, defendant,

(4) Lee F. Jackson, Dallas County Judge, defendant,

(5) Jim Jackson, John Wiley Price, Mike Cantrell, and Kenneth Mayfield, Dallas County Commissioners, defendants,and

(6) Bruce Sherbet, Elections Administrator of Dallas County, Texas, defendant.

TABLE OF CONTENTS

Page

Questions Presented i

Parties iii

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 2

Statement of the Case 2

A. Dallas County's History of Appointing Election Judges 3

B. Initial Proceedings Before the Three-Judge Court 6

C. The Decision of the Three-Judge Court 9

The Questions Are Substantial 10

1. THE DISTRICT COURT ERRED BY INQUIRING INTO THE PURPOSE OR MOTIVATION BEHIND THE CHANGES IN THE PROCEDURES FOR SELECTING ELECTION JUDGES; THE DISTRICT COURT'S RULING CONFLICTS WITH *ALLEN V. STATE BOARD OF ELECTIONS* AND *PERKINS V. MATTHEWS* 12

2. THE DISTRICT COURT'S RULING THAT THE ATTORNEY GENERAL'S PRECLEARANCE IN 1985 OF REVISIONS TO THE TEXAS ELECTION CODE IMPLICITLY PRECLEARED DALLAS COUNTY'S CHANGES IN PROCEDURES FOR SELECTING ELECTION JUDGES THAT WERE NOT PART OF THE STATE'S 1985 SUBMISSION CONFLICTS WITH *MCCAIN V. LYBRAND* AND *CLARK V. ROEMER* 17

TABLE OF CONTENTS – Continued

Page

3. THE DISTRICT COURT ERRED IN EXEMPTING FROM SECTION 5 PRECLEARANCE VOTING CHANGES THAT ARE IMPLEMENTED AS A RESULT OF DISCRETIONARY ACTS OF LOCAL OFFICIALS 20

4. THE DISTRICT COURT'S RULING THAT SECTION 5 PRECLEARANCE IS NOT REQUIRED OF VOTING CHANGES THAT HAVE BEEN IMPLEMENTED BY A COVERED JURISDICTION BUT ARE LATER ABANDONED OR RESCINDED CONFLICTS WITH *PERKINS V. MATTHEWS* 24

5. THE DISTRICT COURT'S JUDGMENT SHOULD BE SUMMARILY REVERSED AND THE COURT SHOULD BE INSTRUCTED TO ISSUE A SECTION 5 INJUNCTION 28

Conclusion 29

TABLE OF AUTHORITIES

Page

CASES:

Allen v. State Board of Elections, 393 U.S. 544 (1969). . *passim*

Beer v. United States, 425 U.S. 130 (1976) 28

Berry v. Doles, 438 U.S. 190 (1978)..... 14, 28

Blanding v. DuBose, 454 U.S. 393 (1982)..... 14

City of Lockhart v. United States, 460 U.S. 125 (1983) 12

City of Pleasant Grove v. United States, C.A. No. 80-2589 (D.D.C. Oct. 7, 1981) 26

City of Pleasant Grove v. United States, 568 F. Supp. 1455 (D.D.C. 1983), *aff'd*, 479 U.S. 462 (1987)..... 27

City of Rome v. United States, 452 F. Supp. 221 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980) 27

Clark v. Roemer, 500 U.S. 646 (1991) 17, 19, 20, 28

Dougherty Co. Bd. of Ed. v. White, 439 U.S. 32 (1978) 12

Georgia v. United States, 411 U.S. 526 (1973) 12, 15

Lopez v. Monterey County, 65 U.S.L.W. 4003 (U.S. November 6, 1996) (1996 WL 637045 (U.S. November 6, 1996))..... .....12, 13

League of United Latin American Citizens #4552 (LULAC) v. Roscoe Independent School District, C.A. No. 1:96-CV-0010-C (N.D. Tex. May 3, 1996)..... 26

McCain v. Lybrand, 465 U.S. 236 (1984) 12, 14, 17, 18, 19, 20

McDaniel v. Sanchez, 452 U.S. 151 (1975).....13, 16

Morse v. Republican Party of Virginia, 116 S. Ct. 1186 (1996) 12, 14, 15, 24, 28

TABLE OF AUTHORITIES – Continued

Page

NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1985) ..... *passim*

NAACP, DeKalb County Chapter v. Georgia, 494 F. Supp. 668 (N.D. Ga. 1980) 27, 28

Perkins v. Matthews, 400 U.S. 379 (1971) .. 12, 14, 16, 24, 28

Presley v. Etowah County Commission, 502 U.S. 491 (1992) 16

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 21

United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110 (1978) 14, 25

United States v. State of Texas, C.A. No. SA-85-CA-2199 (W.D. Tx. 1985) 22, 23, 24

STATUTES AND REGULATIONS:

28 U.S.C. 1253 2

28 U.S.C. 2284(b)(3) 10

42 U.S.C. 1973c (Section 5 of the Voting Rights Act) 1, 2

Tex. Election Code Ann., Sec. 32.002 .. 4, 5, 7, 9, 10, 17

Tex. Election Code Ann., Sec. 32.071 2

Tex. Election Code Ann., Sec. 32.075 2

Tex. Election Code Ann., Sec. 63.001 2

Tex. Election Code Ann., Sec. 64.031 2

Tex. Election Code Ann., Sec. 125.005 2

28 C.F.R. sec. 51.15(a) (1996 ed.) 23

TABLE OF AUTHORITIES -- Continued

Page

MISCELLANEOUS:

S. Rep. No. 94-295 (94th Cong. 1st sess.) (1975) 16

S. Rep. No. 97-417 (97th Cong. 2nd sess.) (1982) 25

JURISDICTIONAL STATEMENT

This is a direct appeal from a February 7, 1997, final judgment and order of a three-judge court of the United States District Court for the Northern District of Texas, under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c.

OPINIONS BELOW

The October 18, 1996, opinion of the district court denying appellants' application for an injunction under Section 5 of the Voting Rights Act is unreported and appears in the appendix to the jurisdictional statement in No. 96-987 at App. 1a.[1] The February 7, 1997, final judgment and order are also unreported and appear in the appendix hereto at App. 65a.

JURISDICTION

The order of the three-judge district court denying appellants' application for a preliminary injunction under Section 5 of the Voting Rights Act, as amended, 42 U.S.C.

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[1] Except for the changes on page 1 and the insertion of a new paragraph on page 10, *infra*, of this jurisdictional statement (updating the procedural history of the case), this jurisdictional statement is identical to the one filed by appellants in No. 96-987. Appellants, therefore, have not duplicated the appendix. Citations in this jurisdictional statement are to the appendix which was filed with the appellants' jurisdictional statement in No. 96-987 (App. 1a to App. 64a). In addition, appellants have also prepared an appendix to this jurisdictional statement which includes the most recent orders and judgment of the three-judge court, and appellants' notice of appeal. The pages in the attached appendix (App. 65a to 72a) have been numbered so as to follow consecutively with those pages which were set forth in the appendix that accompanied the jurisdictional statement in No. 96-987.

1973c, was entered on October 18, 1996. App. 1a. Appellants filed a notice of appeal on October 18, 1996. App. 9a.

A final judgment and order was entered on February 7, 1997. App. 65a. Appellants filed a notice of appeal on February 21, 1997. App. 70a. The jurisdiction of this Court rests on 42 U.S.C. 1973c and 28 U.S.C. 1253.

STATUTORY PROVISIONS INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, is set forth at App. 50a-51a.

STATEMENT OF THE CASE

This case arises because Dallas County, Texas, which is a covered jurisdiction under Section 5 of the Voting Rights Act, has changed its procedures for selecting election judges on several occasions without obtaining Section 5 preclearance. Election judges are appointed annually by county commissioners courts in Texas and are in charge of and responsible for the management of the polls on election day. Texas Election Code Ann. § 32.071. In Texas, election judges, also known as presiding judges, possess a wide variety of authority under state law, and the performance of their duties and responsibilities on election day affects voters and the electoral process in a fundamental way. For example, election judges have the power to: decide who is qualified to vote on election day (Tex. Election Code Ann. § 63.001); assist voters who are unable to mark a ballot either because of physical disability or inability to read or write (Texas Election Code Ann. § 64.031); and inspect voting machines throughout election day to insure that the machines are properly working and have not been tampered with. (Tex. Election Code Ann. § 125.005). As presiding officers at the polls, election judges also are empowered to preserve order at the polls and to issue

arrest warrants for those who interfere with the voting process. Tex. Election Code Ann. § 32.075.

Because election judges possess such a broad range of authority over voters and elections, changes in the procedures used to select them go to the very heart of Section 5. Dallas County's most recent change in selecting judges, adopted on October 8, 1996, and implemented in the November 5, 1996 elections, for example, demonstrates the dramatic effect such changes can have on voters and the electoral process, from both a racial and partisan standpoint. At least 54 African-Americans and 22 Latinos (including the six appellants herein) who had previously served as election judges were removed as judges as a result of the county's October 8 decision. App. 33a. Moreover, it was stipulated below that the county's October 8, 1996 decision left some election judge positions vacant in precincts where no Republican judge could be named, and that those precincts left with such vacancies were, for the most part, predominately African-American or Latino. App. 15a. Whereas many Democrats and many Republicans had served as election judges prior to 1996, Dallas County's October 8 change removed all 109 Democrats and named only Republicans to serve as election judges at approximately 500 polling locations. App. 3a, 15a, 35a. The district court, however, declined to require that Dallas County's changes in procedures to select election judges undergo Section 5 preclearance.

A. Dallas County's History of Appointing Election Judges

Although the record below does not reflect how Dallas County appointed election judges at the time of the coverage date of the Voting Rights Act in Texas (November 1, 1972), it is undisputed that Dallas County

changed its method of selecting election judges in 1983.[2] Beginning in 1983 and continuing until 1995, the County selected election judges recommended by the county elections clerk utilizing the results of the last held Presidential election (hereafter, "the Presidential precinct method"). App. 12a-13a. Using the Presidential precinct method, "Dallas County Commissioners, acting under § 32.002, selected an election judge in each precinct from the political party whose candidate carried that precinct in the preceding presidential election." App. 2a. It is undisputed that no preclearance was sought or obtained for the 1983 change to the Presidential precinct method of selecting poll judges. See App. 15a.

In 1985, the State of Texas recodified and enacted comprehensive revisions to its election code and submitted those revisions to the Attorney General for Section 5 preclearance. App. 38a-46a. In its Section 5 submission to the Attorney General, the State explained that the 1985 revisions to Tex. Election Code Ann. § 32.002 "merely clarifies the beginning date and duration of the appointment of an election judge for a county election precinct." App. 41a. The Department of Justice precleared the revisions to the Texas Election Code on August 16, 1985. App. 47a-49a.

The parties stipulated that the 1985 legislation "made no mention of the use of any method by Dallas County for the appointment of election judges." App. 12a. The

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[2] Since 1972, the Texas Election Code has authorized county commissioners courts, the governing bodies, to appoint election judges. Texas Election Code Ann. § 32.002. App. 52a. These appointments are made based upon recommendations of a county elections clerk, who compiles a list of nominees based on a formula or practice established by the county commissioners court. *Id.* Since 1972, Texas law has not prescribed any particular formula or practice for selecting such judges, however.

parties also stipulated that both before and after the 1985 amendments and recodification to the Texas Election Code (§ 32.002), Dallas County appointed its election judges pursuant to the Presidential precinct appointment method adopted in 1983. App. 12a. Consequently, nothing in the 1985 revisions or recodification of the Texas Election Code changed Dallas County's procedures for appointing election judges.

In each election held from 1983 to 1995, Dallas County officials administered the Presidential precinct method of selecting election judges. App. 12a. It is undisputed, and the district court found, that on August 8, 1995, Dallas County "adopted an order changing the benchmark from the preceding presidential election to the 1994 United States Senate election returns in each precinct" (App. 2a and 13a) (hereafter, "U.S. Senate precinct method"). Like the Presidential precinct method, the U.S. Senate precinct method provided for the appointment of a Republican as an election judge in those precincts won by the Republican candidate in the November 1994 U.S. senatorial election, and a Democrat as election judge in those precincts carried by the Democratic candidate in that election. App. 13a, 31a. Dallas County failed to submit the 1995 change to the U.S. Senate precinct method of selecting election judges for preclearance under the Voting Rights Act. App. 14a.

It was also undisputed that on September 3, 1996, the Dallas County Commissioners Court again changed its procedures for choosing election judges. App. 2a, 13a-14a. Under the method adopted on September 3, the results of the 1994 U.S. Senate race would be used to select poll judges only in those precincts where the Republican candidate had prevailed. App. 2a. In those precincts where the Democratic candidate in the 1994 U.S. Senate race had prevailed, "the County Commissioner

whose district included that precinct had discretion to choose the election judge." App. 2a.[3] It was stipulated below that Dallas County failed to submit the September 3, 1996 change in the method of selecting judges for preclearance. App. 15a.

By letter dated September 30, 1996, the United States Department of Justice notified the Dallas County Judge that it had received information that Dallas County "had changed the method for selection of election judges" in 1995 and 1996, and that such changes had not received the requisite preclearance under Section 5 of the Voting Rights Act. App. 36a-37a. The Department of Justice advised the County Judge that the changes were "legally unenforceable without Section 5 preclearance." App. 37a. The County failed to make the requested submission.

B. Initial Proceedings Before The Three-Judge Court

On October 3, 1996, plaintiffs, African American and Latino voters who had previously served as election judges in Dallas County but who had been notified of their removal as a result of the September 3, 1996 changes in the practices or procedures for selecting judges, filed

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[3] In addition, under the method of choosing election judges adopted by the County on September 3, 1996, a majority of the county commissioners retained the right not to appoint any particular individual designated by an individual commissioner. App. 29a.

The Dallas County Commissioners Court is comprised of five members. App. 11a. There are four Republicans and one Democrat presently serving on the County Commissioners Court. Each of four commissioners are elected from a single-member district, and the fifth member, the county judge, is elected county-wide or at large.

their original complaint seeking declaratory and injunctive relief. Plaintiffs alleged that the defendants had adopted and administered new practices and procedures for choosing election judges after the effective date of the Voting Rights Act in Texas, and had done so without receiving the necessary preclearance under Section 5. Plaintiffs filed an application for a temporary restraining order and moved for a preliminary injunction seeking to enjoin further administration of the unprecleared changes.

Later that day, following an in chambers hearing on plaintiffs' application for a temporary restraining order, a single-judge of the three-judge court below found that Dallas County's changes in 1995 and 1996 in the method of selecting election judges "would effect changes in voting standards, practices or procedures that have not received preclearance from the Attorney General of the United States." App. 7a. The order restrained the defendants from implementing the 1995 U.S. Senate method of choosing election judges, as well as the modified U.S. Senate precinct method for choosing judges adopted on September 3, 1996. App. 7a.

Following entry of the temporary restraining order, Dallas County did not submit any of the changes in its method of selecting poll judges for Section 5 preclearance. Instead, by Orders dated October 8, 1996, the Commissioners' Court rescinded "any and all policies or practices that provided a method of selecting and appointing presiding [election] judges in Dallas County by any method other than that set out in Tex. Elec. Code, § 32.002 or its predecessor statutes[.]". App. 22a. Since § 32.002 of the Texas Election Code, the enabling statute which authorizes Texas counties to appoint election

judges, does not prescribe any specified method of selecting judges, the effect of the County Commissioners' October 8 order was to allow the county commissioners to select election judges without reference to any benchmark of past election results. As noted above, the county's October 8 order had a substantial racial and partisan effect.[4]

The plaintiffs filed their amended complaint on October 10, 1996, challenging under Section 5 the new procedures for selecting election judges adopted on October 8, 1996. Plaintiffs sought declaratory and injunctive relief, and filed an amended motion for a preliminary injunction, seeking to enjoin the defendants from implementing any unprecleared changes in the practices or procedures used to select election or poll judges in future elections. A three-judge court comprised of Circuit Judge Patrick Higginbotham, and District Judges Sidney Fitzwater and Terry Means, was convened to hear the claims.

Defendants denied that the changes adopted and administered in 1983, 1995, and 1996, constituted changes in voting-related standards, practices, or procedures subject to Section 5 preclearance requirements. Defendants argued that since none of the earlier changes in method of selecting election judges in Dallas County ever received Section 5 preclearance, those methods had been legally unenforceable. Thus, the defendants argued, the county's October 8, 1996 change did not have to undergo Section 5 preclearance because the county was merely

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[4] As noted above, it was stipulated below that the October 8, 1996 Order of the Commissioners Court left approximately 30 precincts without election judges, mostly in precincts where black voters and/or Latino voters predominate. See App. 15a. The only black member of the Dallas County Commissioners Court, who also is the county's only Democratic commissioner, voted against the October 8, 1996 change. App. 27a.

adopting a method of choosing election judges consistent with § 32.002 of the Texas Election Code. The county also contended that since the Texas Election Code that has been in place since the coverage date of the Voting Rights Act did not specify any standard or procedure for appointment of judges, the county's October 8 change to a selection procedure without regard to election results was merely a reversion to the last legally enforceable method of choosing judges, and thus Section 5 preclearance was not required.

A hearing was held before the three-judge court on plaintiffs' amended motion for a preliminary injunction on October 16, 1996.

C. The Decision of the Three-Judge Court

On October 18, 1996, the three-judge court issued its decision. App. 1a-4a. Without citing a single case to support its decision, the court found that because the commissioners in Dallas County have always retained discretion under the Texas Election Code to appoint election judges, the changes in the method of selecting judges in 1983, 1995, and 1996 merely reflected "[s]hifts in the strengths of [political] parties and changing perceptions of power[.]" App. 3a. The district court observed that all three methods employed by Dallas County to select election judges "utilize partisan affiliation as an informing principle in the exercise of the appointive power." App. 3a. The Court found that Congress did not intend "that Section 5 freeze partisan choices". App. 3a. Concluding that the changes in the method of choosing election judges in Dallas County simply reflected the "ebb and flow of political power, manifesting itself in an insistence on party affiliation" (App. 3a), the district court ruled that the changes were not "change[s] in election practice or procedure contemplated by Section 5 of the Voting

Rights Act." App. 3a. The court below also observed that even if preclearance was required, "it would be proper at this stage of the litigation for this court to approve the Commissioners Court's exercise of its power of appointment under § 32.002." App. 4a.

A notice of appeal was filed on October 18, 1996. App. 9a-10a. The district court denied an application for a stay on October 22, 1996. App. 5a. An application for a stay and/or injunction pending appeal presented to Mr. Justice Scalia, and referred by him to the full Court, was denied on October 29, 1996. No. A-298.

Appellants filed a jurisdictional statement on December 18, 1996, and the appellees filed a motion to dismiss or affirm on January 18, 1997. Meanwhile, a single judge of the three-judge court below granted appellees' Rule 12(b)(6) motion to dismiss and entered a "judgment" on January 6, 1997, dismissing the case with prejudice. See Appellee's motion to dismiss or affirm at App. 1-3. The judgment of dismissal was invalid, however, because a single judge of a three-judge district court "shall not . . . enter judgment on the merits." 28 U.S.C. § 2284(b)(3). Because the single judge lacked authority to enter the judgment on the merits, appellants filed an unopposed motion to defer consideration of their appeal in this Court on January 31, 1997. The single judge vacated the invalid judgment. App. 68a. On February 7, 1997, the three-judge court entered a final judgment and order. App. 65a. Appellants filed a notice of appeal from that judgment on February 21, 1997. App. 70a.

THE QUESTIONS ARE SUBSTANTIAL

This Court has made clear that Section 5 of the Voting Rights Act reaches any voting or election standard, practice, or procedure "which alter[s] the election law of a covered State in even a minor way." *Allen v. State Board of*

Elections, 393 U.S. 533, 566 (1969). The changes at issue in this appeal go to the very heart of the Voting Rights Act. Nothing could go to the core of the Voting Rights Act and Section 5 more than a change in the procedures for selecting election officials who conduct elections and decide who may vote on election day. Election judges play a central and critical role in the election process. Changes in the procedures used to select them are unquestionably voting standards, practices or procedures within the meaning of Section 5.

It is undisputed that Dallas County's prior methods of appointing election judges has enabled a significant number of blacks and Latinos to serve as election judges, as well as a substantial number of Democrats. Prior to 1996, for example, at least 54 blacks and 22 Latinos served as poll judges. App. 33a. Prior to the October 8 order of the Dallas County Commissioners Court, over 100 Democrats had been designated to serve as election judges for the November 1996 elections. App. 35a. Also prior to October 8, 1996, all precincts within Dallas County had election judges appointed to serve on election day.

It is undisputed that Dallas County's October 8, 1996 order changed the procedures used to select election judges and this change altered the status quo in a major way. As noted above, 54 blacks and 22 Latinos who had served as election judges were removed. App. 33a. Equally shocking, the October 8, 1996 change in procedures left election judge positions vacant in over 64 precincts, and most of those were predominantly black and/or Latino. App. 15a, 35a. Not a single Democrat was selected to serve as an election judge for the November 5 election at the nearly 500 polling places in Dallas County. App. 14a-15a, 35a.

The district court, which failed to cite any case or other legal authority in support of its ruling, exempted

Dallas County's changes in selecting election judges from the preclearance requirements of Section 5. As we show below, the lower court's decision is directly contrary to the decisions of this Court and should be summarily reversed. Alternatively, this Court should note probable jurisdiction.

1. THE DISTRICT COURT ERRED BY INQUIRING INTO THE PURPOSE OR MOTIVATION BEHIND THE CHANGES IN THE PROCEDURES FOR SELECTING ELECTION JUDGES; THE DISTRICT COURT'S INQUIRY CONFLICTS WITH *ALLEN V. STATE BOARD OF ELECTIONS* AND *PERKINS V. MATTHEWS*.

In a Section 5 enforcement case such as this one, the only questions for the local district court to consider are: "(i) whether a change is covered by Section 5, (ii) if the change is covered, whether Section 5's approval requirements have been satisfied, and (iii) if the requirements have not been satisfied, what relief is appropriate." *McCain v. Lybrand*, 465 U.S. 236, 250 n.17; *Lopez v. Monterey County*, 1996 WL 637045, (U.S. November 6, 1996) at *9; *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983).

This Court, in case after case, has admonished three-judge district courts that the Attorney General and the District Court for the District of Columbia possess exclusive authority to decide the purpose or effect of a change in any voting standard, practice, or procedure. See *Morse v. Republican Party of Virginia*, 116 S. Ct. 1186, 1204 (1996); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985); *McCain v. Lybrand*, *supra*, 465 U.S. at 250; *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32, 42 (1978); *Georgia v. United States*, 411 U.S. 526, 534 (1973); *Perkins v. Matthews*, 400 U.S. 379, 383-385 (1971); *Allen v. State Bd. of Elections*, *supra*, 393 U.S. at 570.

Indeed, earlier this term, this Court unanimously reversed a decision of a three-judge court in a Section 5 enforcement action, stating:

> On a complaint alleging failure to preclear election changes under Section 5, that court lacks authority to consider the discriminatory purpose or effect of the changes. . . . Congress designed the preclearance procedure to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process. *McDaniel* [*v. Sanchez*], 452 U.S. [130] at 149 [1973]. Congress chose to accomplish this purpose by giving exclusive authority to pass on the discriminatory effect or purpose of an election change to the Attorney General and to the District Court for the District of Columbia.

Lopez v. Monterey County, 65 U.S.L.W. 4003, 4007 (1996 WL 637045 (U.S. November 6, 1996)).

In exempting Dallas County's 1983, 1995, and 1996 changes in the practices or procedures for selecting election judges from the preclearance requirements of Section 5, the three-judge court found a common thread motivating the actions of Dallas County officials in selecting election judges: political or partisan concerns. According to the district court, "the Presidential and Senatorial methods of appointment, which have now been rescinded, as well as the proposed appointment of Republicans across the Board, all utilize partisan affiliation as an informing principle in the exercise of the appointive power." App. 3a. The district court thus concluded that partisan politics, and not racial discrimination, motivated each of Dallas County's changes in procedures for selecting election judges.

The district court erred by examining the *purposes* behind the changes at issue to decide the *threshold* question of whether the changes were subject to the preclearance requirements of Section 5.[5] In concluding that partisan politics and not racial discrimination motivated the changes in the procedures used to select election judges, the three-judge court improperly undertook an examination of the "substantive 'discrimination questions' " (*Allen, supra*, at 559) that are exclusively reserved for either the Attorney General or the District of Columbia court. The decision below, therefore, must be summarily reversed.

This Court has repeatedly reversed judgments of three-judge courts that similarly have failed to properly apply Section 5: *NAACP v. Hampton County Election Commission, supra; McCain v. Lybrand, supra; Blanding v. Dubose*, 454 U.S. 393 (1982) (summary reversal); *Allen v. State Board of Elections, supra; Perkins v. Matthews, supra; Morse v. Republican Party of Virginia, supra; United States v. Bd. of Comm'rs of Sheffield, Alabama*, 435 U.S. 110 (1978); and *Berry v. Doles*, 438 U.S. 190 (1978). The Court should do so again here.

It was also error for the district court to carve out a political exception to the preclearance requirements under the Voting Rights Act. The district court ruled that Dallas County's changes in the method of selecting election judges were driven by politics, and that the "ebb and flow of political power, manifesting itself in an insistence

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[5] The fact that nearly all African American and Latino poll judges have been removed as election judges by the County's October 6, 1996, decision, and that precincts which left election judge positions vacant were predominantly African American and/or Latino, shows the October 8 changes have a *"potential* for discrimination." *NAACP v. Hampton County Election Comm'n, supra*, 470 U.S. at 181 (emphasis in original).

on party affiliation, is not a change in election practice or procedure contemplated by Section 5 of the Voting Rights Act." App. at 3a.[6]

The district court's decision to exempt these changes from Section 5 preclearance because they may have been motivated, in whole or in part, by political or partisan concerns, "opens a loophole in the statute the size of a mountain[.]" *Morse v. Republican Party of Virginia*, 116 S. Ct. 1186 (1996) (Breyer, J., concurring). Many voting-related changes that take place in communities subject to the preclearance requirements of the Voting Rights Act are the result of a calculation or reallocation of political power, but Section 5 preclearance of such changes is nonetheless required. For example, reapportionment or redistricting plans are subject to the preclearance requirements of Section 5, *Georgia v. United States*, 411 U.S. 526 (1973), even though such plans may be the product of political gerrymandering or other partisan efforts (*e.g.*, incumbency protection).

Under the district court's ruling, a covered jurisdiction would be able to escape Section 5 review of even the

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[6] Appellants did not seek an injunction below to obtain preclearance review of shifts in political power. Indeed, appellants agree that shifts in political power on local governmental bodies should not be subject to Section 5's preclearance requirements. We respectfully submit, however, that such shifts are not what this case is about. Here, Dallas County has changed its *standards or procedures* for determining who may serve as an election judge in each precinct. Those standards or procedures may change even when there has been no shift of political power on a local governing body. In other words, shifts in the political make-up of a local government *may or may not* affect voters and elections, but changes in standards or procedures for selecting election judges *will always* have such an impact. The district court's ruling failed to recognize this critical distinction.

most overt racially discriminatory voting changes if it could point to some political reason for its decision. Changes in procedures used to select election judges, who perform a public electoral function and have a direct impact on voters and the election process, are precisely the types of changes that Section was intended to reach.

In sum, the district court failed to recognize its limited role as a Section 5 coverage court. The lower court's decision to exempt Dallas County's changes from Section 5 preclearance by looking to the motivations behind such changes squarely conflicts with numerous decisions of this Court, including *Allen, supra* and *Perkins, supra*. Likewise the district court's ruling that exempts politically motivated voting changes from Section 5 preclearance review is contrary to "[t]he prophylactic purposes of the Section 5 remedy . . . requiring 'review of *all* voting changes prior to implementation by the covered jurisdictions.' " *McDaniel v. Sanchez*, 452 U.S. 151 (1975), citing S. Rep. No. 94-295 (94th Cong. 1st Sess.) (1975), p. 15. See also, *Presley v. Etowah County Comm'n*, 502 U.S. 491, 509 (1992). Application of these principles here clearly requires reversal of the decision below.[7]

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[7] The district court mistakenly concluded that because Dallas County officials have always had the power to appoint election judges, Texas law left local officials with discretion involving "only the identity of persons to be appointed [as election judges.]" App. 3a. As has been shown, Dallas County officials, in carrying out their authority to appoint election judges, have been able to exercise their discretion to effectuate vast changes in the racial and political composition of the election judges, beyond simply changing the names of individuals selected. Whole *categories* of persons are no longer eligible to serve (*e.g.*, Democrats). In any event, appellants did not make the claim below that changes in the identity of individuals selected as poll judges are subject to Section 5 preclearance, and do not make such an argument in this Court.

2. THE DISTRICT COURT'S RULING THAT THE ATTORNEY GENERAL'S PRECLEARANCE IN 1985 OF REVISIONS TO THE TEXAS ELECTION CODE IMPLICITLY PRECLEARED DALLAS COUNTY'S CHANGES IN PROCEDURES FOR SELECTING ELECTION JUDGES THAT WERE NOT PART OF THE STATE'S 1985 SUBMISSION CONFLICTS WITH *MCCAIN V. LYBRAND* AND *CLARK V. ROEMER*.

This Court has repeatedly and emphatically rejected after-the-fact efforts of covered jurisdictions to redefine Section 5 submissions in an effort to escape Section 5 review of changes that were not included in the submission. This Court has done so "because the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *McCain*, 465 U.S. at 249.

The district court's ruling that the Department of Justice's preclearance of the State of Texas' 1985 submission of revisions and recodification of its election code "precleared the process of selecting election judges in Texas" (App. 3a) was error. The 1985 amendments did not prescribe any particular method of selecting election judges and the parties below so stipulated. App. 12a, 52a. Nevertheless, the district court found that the Texas Election Code Ann. § 32.002 contemplated the selection of election judges by partisan affiliation and that the Department of Justice's 1985 preclearance of minor revisions to that statute implicitly precleared Dallas County's changes in the methods of selecting election judges. In the words of the district court, "[i]t would be unrealistic

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Rather appellants challenge Dallas County's changes in the *standards or procedures* used to select election judges.

to conclude that this preclearance did not contemplate the selection of election judges by partisan affiliation." App. 3a.

The district court's ruling is plainly wrong. Preclearance of the 1985 recodification and amendments to the election code could not have implicitly precleared the method of choosing election judges in Dallas County because there were no changes in any procedures for selecting judges occasioned by that legislation. The 1985 legislation merely "clarif[ied] the beginning date and duration of the appointment of an election judge[.]" App. 41a.[8] In addition, it is undisputed that before and after the 1985 legislation, Dallas County employed the same Presidential precinct method of selecting judges. App. 12a. Thus, the 1985 legislation did not effect any changes in Dallas County's procedures for selecting election judges. Accordingly, the Department of Justice's preclearance of the 1985 legislation could not have precleared the 1983 change to a Presidential precinct method, much less the changes in 1995 and 1996.

The district court's ruling squarely conflicts with this Court's decision in *McCain v. Lybrand*, 465 U.S. 236 (1984). In *McCain*, this Court reversed a district court judgment denying plaintiffs' request for an injunction barring further elections under a system of county government created by a 1966 statute that had never been submitted for preclearance. The district court in *McCain* had ruled that the 1966 statute was implicitly precleared when the Attorney General gave Section 5 preclearance to a 1971 statute that increased the size of the county's governing body,

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[8] Appellants made no claim that the 1985 legislation had failed to undergo preclearance. Appellants challenged *Dallas County's* implementation of changes in 1983, 1995, and 1996 in the procedures used to select election judges.

because the seats were to be elected using the same election system set forth in the 1966 statute. In reversing, this Court announced its holding:

> A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices.

McCain, supra, at 256-57.

The district court's decision also conflicts with this Court's unanimous decision in *Clark v. Roemer,* 500 U.S. 646 (1991). In *Clark,* this Court reversed a decision of a three-judge court that preclearance of an increase in the number of elected judgeships by implication precleared "all of the judicial positions necessary to reach that number." 500 U.S. at 657. Relying on *McCain v. Lybrand, supra,* this Court stated that a covered jurisdiction "must identify with specificity each change that it wishes the Attorney General to consider," *id.,* at 658, and confirmed the long-standing principle that "any ambiguity in the scope of the preclearance request must be construed against the submitting jurisdiction." *Id.* at 659 (citation omitted).

Here, neither Dallas County nor the State of Texas ever made a Section 5 submission to the Attorney General or the District of Columbia court that sought preclearance of any changes in Dallas County's procedures for selecting election judges. It can hardly be said, therefore, that any submission was made to the Attorney General that identified "with specificity" (*Clark, supra,* at 659) any changes in selecting election judges in Dallas County. As this Court observed in *Allen,* 393 U.S. at 571, "[a] fair interpretation of the [Voting Rights] Act requires that the State [or local jurisdiction] in some unambiguous and recordable manner submit any legislation or regulation in

question directly to the Attorney General with a request for his consideration pursuant to the Act." Clearly, that did not happen here, as the 1985 recodification and amendments to the Texas Election Code did not effectuate any changes in Dallas County's procedures for selecting election judges.

This Court has rejected the concept of preclearance by implication, and should do so again here. The district court's decision plainly conflicts with *McCain* and *Clark*, and should be summarily reversed.

3. THE DISTRICT COURT ERRED IN EXEMPTING FROM SECTION 5 PRECLEARANCE VOTING CHANGES THAT ARE IMPLEMENTED AS A RESULT OF DISCRETIONARY ACTS OF LOCAL OFFICIALS.

The district court's October 18 decision also allows covered jurisdictions to enact and administer voting changes, and then evade Section 5 review, if the jurisdiction can show that it is simply exercising discretion granted under state law. This Court has had occasion to consider this issue in the context of setting election dates and has emphatically rejected that proposition. In *NAACP v. Hampton County Election Comm'n, supra,* Hampton County reset an election date and argued that because its rescheduling of an election "was merely an administrative effort to comply with a statute that had already received clearance, it was not a change of such magnitude as to trigger the requirements of Section 5." 470 U.S. at 181. This Court, however, rejected that argument and required that the change undergo Section 5 preclearance. The Court explained that the discretion involved in setting an election date had "potential for discrimination" because the date could affect candidates desiring to enter

the race as latecomers, as well as voter turnout. 470 U.S. at 181.

The reasons that discretionary actions of state and local officials are subject to Section 5's preclearance requirements was explained thirty years ago in *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966), when this Court stated:

> Congress knew that some of the States covered by . . . the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.

Contrary to the district court's ruling here, it is precisely because discretionary actions of state and local officials can produce changes that affect voters and elections that they fall within the scope of Section 5. Exempting changes that involve the exercise of discretion by state or local election officials from the preclearance requirements of Section 5 will permit covered jurisdictions to "contriv[e] new rules of various kinds for the sole purpose of perpetuating voting discrimination." *South Carolina v. Katzenbach*, 383 U.S. at 335.

In this case, the district court held that the Texas Election Code conferred the authority on county officials to select election judges and that the county's changed procedures for choosing election judges simply reflected an exercise of discretion under the state statute. The district court's ruling carves out an exception that could eviscerate Section 5. If voting changes occasioned by discretionary actions of local officials are beyond the

reach of Section 5, covered jurisdictions will be encouraged to enact broad enabling legislation that allows local officials to change election practices, and then argue that such changes are beyond the scope of Section 5 review because they merely constitute discretionary action. This runs directly contrary to Congress' intent in enacting Section 5, which this Court has stated is to be effectuated by giving Section 5 "the broadest possible scope." *Allen*, 393 U.S. at 567.

Other three-judge courts have applied these principles in considering the issue of whether voting changes occasioned by the discretionary actions of election officials are subject to Section 5's preclearance requirements and have reached a result contrary to the decision of the district court in this case. In *United States v. State of Texas*, C.A. No. SA-85-CA-2199 (W.D. Tx. 1985) (3-judge court), the Governor of Texas called a special election to fill a vacancy in the state's congressional delegation.[9] The United States brought a Section 5 enforcement case to require preclearance of the setting of the special election date. The State of Texas argued that the Governor's decision to call for an emergency election pursuant to a state statute that had already undergone Section 5 preclearance did not constitute a change within the meaning of Section 5. The three-judge court recognized that the Governor had the discretion under Texas law to declare the election an emergency. Nevertheless, the three-judge court ruled that the discretionary act of setting a special election date required preclearance because there was "no requirement

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[9] This decision is unreported and is reproduced in the Appendix at 53a-57a.

under Texas law to prevent discretion [from] being exercised in a manner that would adversely impact voters protected by the Act." App. 55a.[10]

In sum, the district court's decision to exempt the voting changes from Section 5 preclearance requirements opens a gaping loophole in Section 5 coverage. Under the district court's ruling, covered jurisdictions can evade federal review of virtually any voting change by enacting enabling legislation that confers broad discretion on local election officials. Once such enabling legislation is precleared, a local government could change its election procedures year after year without subjecting such changes to Section 5 review. In fact, under the three-judge court's decision, if local election officials adopt a new procedure of choosing election judges that provides "no blacks or Latinos need apply", such procedures would not be subject to scrutiny under the preclearance requirements of Section 5 so long as local officials exercised discretion granted them under state law. Such a result would wipe out the gains made under Section 5.[11]

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[10] The district court in *United States v. Texas* also rejected the State of Texas' claim that the Department of Justice's "preclearance of the election code carried with it approval by the Attorney General of whatever emergency election schemes were subsequently ordered by the state election official." App. 56a.

[11] Such a result would also run contrary to the administrative guidelines published by the Department of Justice governing the administration of Section 5. Under those provisions, see 28 CFR § 51.15(a) (1996), implementation of enabling legislation must undergo Section 5 preclearance unless the voting changes occasioned by that implementation are specifically described in the enabling legislation. The Attorney General's interpretation of Section 5 is entitled to deference under this Court's decisions. *NAACP v. Hampton County Election Comm'n*, 470 U.S. at 182.

The district court's ruling is in conflict with *NAACP v. Hampton County Election Comm'n*, as well as the decision in *United States v. State of Texas*, and should be summarily reversed.

4. THE DISTRICT COURT'S RULING THAT SECTION 5 PRECLEARANCE IS NOT REQUIRED OF VOTING CHANGES THAT HAVE BEEN IMPLEMENTED BY A COVERED JURISDICTION BUT ARE LATER ABANDONED OR RESCINDED CONFLICTS WITH *PERKINS V. MATTHEWS*.

The district court's decision conflicts with this Court's decision in *Perkins v. Matthews*, *supra*, which closed the very loophole that the district court re-opened. In *Perkins*, black voters sought to enjoin the City of Canton, Mississippi from implementing a change from a ward election system to an at-large election system for its board of aldermen. The city had conducted its elections from wards after the coverage date of the Voting Rights Act, even though state law that pre-existed the Voting Rights Act required the city to conduct its elections at-large. The city argued that its change back to an at-large system was beyond the scope of Section 5, because it had implemented the ward system in apparent violation of state law. This Court rejected that argument, looking to the election system that was actually in force or effect in Canton to decide whether there had been a change.

The requirement of federal preclearance of voting changes was not inserted into the Voting Rights Act merely to require a mechanistic review, for the mere sake of review. As recently noted in *Morse*, *supra*, "[t]he purpose of preclearance is to prevent all attempts to implement discriminatory voting practices that change the status quo." 116 S. Ct. at 1201 (Stevens, J.). Here, it is undisputed that Dallas County changed the status quo in

1983, 1995, and 1996, without subjecting such changes to federal review under Section 5. App. 12a-15a.[12] By ignoring such changes, the district court's ruling employs a fiction that the changes never existed. Such an "interpretation of Section 5 . . . permits the precise evil that Section 5 was designed to avoid." *United States v. Bd. of Commr's of Sheffield, Alabama*, 435 U.S. 110, 124 (1978).

The district court's decision allows Dallas County to rescind its previously-implemented but unprecleared changes, implement new voting-related procedures and evade Section 5 review. This ruling is in conflict with

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[12] Although the record below does not reveal Dallas County's method of selecting election judges from 1972 to 1983, it is undisputed that those procedures have changed on several occasions since the coverage date and that Section 5 preclearance has not been obtained. If the method of choosing election judges between 1972 and 1993 is the same as that adopted on October 8, 1996, then the district court's ruling allows Dallas County to escape Section 5 coverage by returning to the procedure for selecting poll judges that existed at the time Texas became subject to Section 5's preclearance requirements. Allowing covered jurisdictions to revert back without preclearance to election procedures that were in place when the Voting Rights Act took effect – when electoral systems throughout the Deep South (including Texas) were overtly discriminatory – would fly in the face of Congress' "concern[ ] about the risk of losing what progress has already been won. The gains are fragile. Without the preclearance of new laws, many of the advances of the past decade could be wiped out overnight with new schemes and devices." Sen. Rep. No. 97-417 at 10 (97th Cong. 2nd Sess.) (1982). Clearly it would undermine the purposes of the Voting Rights Act if state and local governments subject to the preclearance provisions of the Voting Rights Act could revert back to voting systems in place at a time when the playing field was far from level, and could do so without federal review of whether such changes are free of a racially discriminatory purpose or effect. Yet the district court's ruling allows for precisely that result.

decisions of other three-judge district courts that have decided this issue.

In *League of United Latino American Citizens #4552 (LULAC) v. Roscoe Independent School District*, C.A. No. 1:96-CV-010-C (N.D. Tex. 1996) (three-judge court) (App. 58a-59a), a Texas school district elected its school board at large, without numbered posts, at the time of the coverage date of the Voting Rights Act. Subsequently, the school board implemented a numbered post provision, but did not submit the change for Section 5 preclearance. In 1995, the school district rescinded the numbered post provision and attempted to revert to the prior method of election (*i.e.*, an at-large system without numbered posts). Latino voters and LULAC sought an injunction requiring the school district to submit the change for Section 5 preclearance. The district court granted the injunction, concluding that the change from an unprecleared at-large system with numbered posts back to a pure at-large system without posts "is a change covered by Section 5 of the Voting Rights Act that must be precleared before it is implemented." (App. 58a).[13]

Other three-judge district courts also have decided the issue of whether a jurisdiction that has implemented an unprecleared change may then enact a different voting procedure without obtaining Section 5 preclearance. See, *e.g.*, *City of Pleasant Grove v. United States*, C.A. No. 80-2589 (D.D.C. October 7, 1981) (unreported) (App.

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[13] The order of the three-judge court in *LULAC v. Roscoe ISD* is unreported and is reproduced in the appendix at App. 58a-59a. Because the order contains limited discussion of the issues that were before the three-judge court and resolved by that decision, appellants are lodging with the Clerk of this Court copies of the plaintiffs' and defendants' pre-trial briefs in that case. Copies of these briefs have been served on counsel for the appellees.

60a-64a); *City of Rome v. United States*, 472 F. Supp. 221, 247 (D.D.C. 1979), *aff'd*, 446 U.S. 156, 186 (1980); and *NAACP, DeKalb County Chapter v. Georgia*, 494 F. Supp. 668 (N.D. Ga. 1980). In each case, the three-judge court reached the opposite result of the district court in this case and decided that all voting changes were required to undergo Section 5 preclearance.

In *City of Pleasant Grove v. United States*, for example, the city sought preclearance of an annexation in the District of Columbia Court.[14] Although the city had actually implemented two unprecleared annexations, it sought preclearance of only one annexation. The City argued that preclearance of the second annexation was unnecessary because the City would no longer enforce the annexation. The three-judge court required simultaneous review of *all* the previously implemented and unprecleared changes, stating:

> Piecemeal changes which appear innocuous when examined individually may in fact produce discriminatory effects when viewed collectively. . . . It would completely contradict the purpose of the Voting Rights Act if a state or municipality were allowed to enforce a change without preclearance and then to escape an otherwise mandatory preclearance requirement simply by stating it would no longer enforce that change.

App. 62a.

Similarly, in *NAACP, DeKalb County Chapter v. Georgia*, 494 F. Supp. 668 (N.D. Ga. 1980), DeKalb County adopted a new procedure governing voter registration

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[14] This decision is unreported and appears in the Appendix at 60a-64a. The decision of the *Pleasant Grove* court on the merits appears at 568 F. Supp. 1455 (D.D.C. 1983), *aff'd*, 479 U.S. 462 (1987).

drives after the coverage date of the Voting Rights Act in Georgia (November 1, 1964). The County then rescinded that change and attempted to revert back to its 1964 procedure. The three-judge court held that the attempt to revert back to the system in place on the coverage date was a change requiring Section 5 preclearance. *NAACP, DeKalb County Chapter v. Georgia, supra,* at 677.

5. THE DISTRICT COURT'S JUDGMENT SHOULD BE SUMMARILY REVERSED AND THE COURT SHOULD BE INSTRUCTED TO ISSUE A SECTION 5 INJUNCTION.

Appellants seek an injunction requiring Dallas County to seek prompt Section 5 preclearance from either the District of Columbia court or the Attorney General of *all* previously administered and unprecleared changes in the standards or procedures used to select election judges (*i.e.*, the 1983, 1995 and 1996 procedures). See, *e.g., Perkins, supra; NAACP v. Hampton County, supra; Clark, supra;* and *Morse, supra.*

Once the injunction is entered, appellants expect that the 1983 Presidential precinct method will receive the requisite preclearance. Once precleared, that method of election would then become the benchmark for measuring whether subsequent changes (*i.e.*, those in 1995 and 1996) are likely to "lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States,* 425 U.S. 130, 141 (1976). If the 1983 Presidential precinct method (or one of the subsequent changes) receives Section 5 preclearance, "the matter will be at an end". *Berry v. Doles,* 438 U.S. at 193. If preclearance is not obtained, then the question of appropriate relief, if any, should be addressed to the district court in the first instance. *NAACP v. Hampton County Comm'n,* 470 U.S. at 182-83.

CONCLUSION

The district court exempted from Section 5 preclearance a series of changes implemented by Dallas County with respect to its procedures for selecting election judges. In doing so, the district court improperly examined the purposes behind those changes. The district court's decision directly contradicts several decisions of this Court, which have made clear the limited role of a local district court in a Section 5 enforcement action. The district court's ruling is also contrary to decisions of this Court which have reversed three-judge courts that attempted to carve out unwarranted exceptions to Section 5.

Accordingly, this Court should summarily reverse the judgment of the district court. Alternatively, this Court should note probable jurisdiction.

Respectfully submitted,

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INDEX

Page

APPENDIX A

Judgment of three-judge court, February 7, 1997 ... 65a

APPENDIX B

Order of three-judge court, February 7, 1997 ..... 66a

APPENDIX C

Order entered by single judge vacating earlier judgment, January 30, 1997 ..... 68a

APPENDIX D

Notice of Appeal, February 21, 1997 ..... 70a

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

B.C. FOREMAN, et al.,	§	
Plaintiffs,	§	Civil Action No.
VS.	§	3:96-CV-2764-D
DALLAS COUNTY, TEXAS, et al.,	§	(Filed Feb. 7, 1997)
Defendants.	§	

JUDGMENT

For the reasons set out in an order filed today, it is ordered and adjudged that this action is dismissed with prejudice.

Taxable costs of court, as calculated by the clerk of court, are assessed against plaintiffs.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

B.C. FOREMAN, et al., Plaintiffs, VS. DALLAS COUNTY, TEXAS, et al., Defendants.	§ § § § § § § § §	Civil Action No. 3:96-CV-2764-D (Filed Feb. 7, 1997)

Before HIGGINBOTHAM, Circuit Judge, and FITZWATER and MEANS, District Judges:

Defendants' November 4, 1996 second Rule 12(b)(6) motion to dismiss plaintiffs' first amended complaint is granted.

As the court reads plaintiffs' first amended complaint, plaintiffs contend only that they are entitled to relief pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. *See* First Am. Compl. at ¶ 1 & prayer (¶¶ (A)-(D)). Therefore, the decision of the three-judge court denying plaintiffs' application for a preliminary injunction establishes that plaintiffs have failed to state a § 5 claim on which relief can be granted. *See* Oct. 18, 1996 Order (three-judge court).

Defendants have not established adequate grounds to recover their attorney's fees in defending suit. This portion of their motion is denied. Defendants are, however, entitled to recover their taxable costs of court.

A judgment of dismissal is filed today.

SO ORDERED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

B.C. FOREMAN, et al., Plaintiffs, VS. DALLAS COUNTY, TEXAS, et al., Defendants.	§ § § § § § § § §	Civil Action No. 3:96-CV-2764-D (Filed Jan. 30, 1997)

ORDER

The January 6, 1997 order granting defendants' November 4, 1996 second Rule 12(b)(6) motion to dismiss plaintiffs' first amended complaint is vacated, as is the judgment signed on January 6, 1997.

As I noted in my January 6, 1997 order, I read plaintiffs' first amended complaint to contend only that they are entitled to relief pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. *See* First Am. Compl. at ¶ 1 & prayer (¶¶ (A)-(D)). Therefore, although the decision of the three-judge court denying plaintiffs' application for a preliminary injunction establishes that plaintiffs have failed to state a § 5 claim on which relief can be granted, *see* Oct. 18, 1996 Order (three-judge court), the limited nature of the action precludes me from addressing as a single judge plaintiff's § 5 claims.

Accordingly, defendants' November 4, 1996 second Rule 12(b)(6) motion to dismiss plaintiffs' first amended

complaint will be referred to the entire three-judge court for determination.

SO ORDERED.

January 30, 1997.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT
JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

B.C. FOREMAN; IDA CLARK; OTIS TARVER; DOMINIC DE LA CRUZ; LOUIS DAVIS; and MANDY PESINA, *Plaintiffs,* VS. DALLAS COUNTY, TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, DALLAS COUNTY JUDGE; JIM JACKSON, JOHN WILEY PRICE, MIKE CANTRELL, and KENNETH A. MAYFIELD, Dallas County Commissioners; and BRUCE SHERBET, Elections Administrator of Dallas County, Texas, *Defendants.*	§	CIVIL ACTION NO. 3:96-CV-2764-D (Filed Feb. 21, 1997)

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs B.C. Foreman, Ida Clark, Otis Tarver, Dominic De La Cruz, Louis Davis, and Mandy Pesina, hereby appeal to the Supreme Court of the United States pursuant to 28 U.S.C. § 1253 from: the Judgment entered February 7, 1997, dismissing the case with prejudice, and from the Order of the same entry

date granting Defendants' Rule 12(b)(6) Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with the Federal Rules of Civil Procedure, I hereby certify that a true and correct copy of the foregoing document has been served on the following opposing counsel this 21st day of February, 1997:

C. Robert Heath
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/s/ Kenneth H. Molberg
Kenneth H. Molberg

Supreme Court, U.S.
FILED
MAR 28 1997
OFFICE OF THE CLERK

No. 96-1389

In The

Supreme Court of the United States

October Term, 1996

B.C. FOREMAN, IDA CLARK, OTIS TARVER, DOMINIC DE LA CRUZ, LOUIS DAVIS, and MANDY PESINA,

Appellants,

v.

DALLAS COUNTY, TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, Dallas County Judge; JIM JACKSON, JOHN WILEY PRICE, MIKE CANTRELL, and KENNETH MAYFIELD, Dallas County Commissioners; and BRUCE SHERBET, Elections Administrator of Dallas County, Texas,

Appellees.

On Appeal From The United States District Court For The Northern District Of Texas

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Is preclearance required under section 5 of the Voting Rights Act when a commissioners court changes the way it considers political party affiliation when deciding whom it will appoint as election judges?

2. If so, is the commissioners court required to obtain preclearance when it abandons an unprecleared standard and reinstates the most recent precleared standard?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iv

Statement of the Case 1

A. Corrections to appellants' statement of the case..... 1

B. Summary of different methods of appointing election judges 2

1. The statutory framework – section 32.002, Tex. Elec. Code 3

2. Methods used by the commissioners court to determine the list of appointees 3

(a) The method used from 1972 until 1983 4

(b) The Presidential precinct method – 1983-1994 4

(c) The Senatorial precinct method – 1995 5

(d) The Senatorial precinct method (revised) – September 1996..... 5

(e) The October 1996 orders..... 6

The Questions Are Not Substantial 7

A. The consideration of partisan affiliation by an appointing authority when it determines whom it will appoint is not a voting qualification or prerequisite to voting or a standard, practice or procedure with respect to voting within the meaning of section 5 of the Voting Rights Act 7

TABLE OF CONTENTS – Continued

Page

B. Even if the decision-making process is covered by section 5, a jurisdiction may abandon an unprecleared, legally unenforceable practice and reinstate the most recently precleared practice 14

C. A fair reading of the district court opinion does not reveal the departures from established Voting Rights jurisprudence suggested by the appellants..... 19

D. The appeal comes before the Court on an incomplete record that does not contain the evidentiary basis necessary to sustain the appellants' argument and reverse the district court..... 23

Conclusion 26

TABLE OF AUTHORITIES

Page

CASES

City of Lockhart v. United States, 460 U.S. 125 (1983) 16

City of Pleasant Grove v. United States, C.A. No. 80-2589 (D.D.C. October 7, 1981) (unreported)..... 18

City of Rome v. United States, 472 F. Supp. 221 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980) 18

Connor v. Waller, 421 U.S. 656 (1975) 14

Gresham v. Harris, 695 F. Supp. 1179 (N.D. Ga. 1988), *vacated and remanded for consideration of mootness*, 488 U.S. 978 (1988), *aff'd after remand*, 495 U.S. 954 (1990) 14, 18, 24

Johnson v. Massachusetts, 390 U.S. 511 (1968)..... 25

League of United Latin American Citizens #4552 (LULAC) v. Roscoe Ind. Sch. Dist., C.A. No. 1:96-CV-010-C (N.D. Tex. 1996) (3-judge court) (unreported)..... 19

Lopez v. Monterrey County, ___ U.S. ___, 117 S.Ct. 340 (1996)..... 20

McCain v. Lybrand, 465 U.S. 236 (1984) 22

Miller v. Johnson, ___ U.S. ___, 115 S.Ct. 2475 (1995) 13

Mitchell v. Oregon Frozen Foods Co., 361 U.S. 231 (1960)..... 25

NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985)..... 9

NAACP, DeKalb County Chapter v. Georgia, 494 F. Supp. 668 (N.D. Ga. 1980) (3-judge court).....17, 18

Perkins v. Matthews, 400 U.S. 379 (1971) 15, 16

TABLE OF AUTHORITIES – Continued

Page

Presley v. Etowah County Commission, 502 U.S. 491 (1992) 10

Shaffer v. Carter, 252 U.S. 37 (1920) 1

Smith v. Mississippi, 373 U.S. 238 (1968) 25

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 13

Thornburg v. Gingles, 478 U.S. 30 (1986) (White, J. concurring) 12

Wainwright v. City of New Orleans, 392 U.S. 598 (1968) 25

Whitcomb v. Chavis, 403 U.S. 124 (1971) 12

STATUTES

Sec. 5, Voting Rights Act, 42 U.S.C. § 1973c ..... *passim*

28 C.F.R. § 51.54(b)(1) 15

TEX. ELEC. CODE ANN. § 32.001(b) 2

TEX. ELEC. CODE ANN. § 32.002 ..... *passim*

TEX. ELEC. CODE ANN. § 32.007 2

TEX. ELEC. CODE ANN. §§ 32.051-35.055 3

MOTION TO AFFIRM

Appellees move to affirm the judgment below on the ground that the question presented is so insubstantial as not to require further argument.

STATEMENT OF THE CASE

Dallas County generally relies on the statement of the case presented by appellants. It does, however, believe that it is necessary to note three corrections to the appellants' statement of the case and that it is helpful to briefly outline the relevant statute and the various methods of selecting election judges discussed in this case.

A. Corrections to appellants' statement of the case.

First, it is incorrect to say, as appellants do, that appellants or any other individuals were "removed" as election judges. *E.g.*, J.S. 11.[1] Election judges serve for a term of one year that ends on July 31. There is no right to

[1] The issues in this case were earlier presented in No. 96-987, an appeal from the denial of a preliminary judgment. While that appeal was pending, the district court dismissed the underlying case. This appeal, No. 96-1389, challenges the final judgment of dismissal and essentially subsumes the earlier appeal of the interlocutory order. *Shaffer v. Carter*, 252 U.S. 37, 44 (1920). Consistent with the practice of the appellants in their Jurisdictional Statement, citations to the Appendix ("App.") are to the Appendix in No. 96-987. Citations to the Jurisdictional Statement ("J.S.") are to the Jurisdictional Statement in this case, No. 96-1389, although as a practical matter the Jurisdictional Statements in the two cases are virtually identical.

continuation in office beyond that time, and no one has any entitlement to reappointment. While some individuals were not reappointed, they were not removed.

Second, the allegations in the jurisdictional statement of how many African-American and Hispanic judges were not reappointed is not in the record. J.S. 2-3. There is an affidavit on that issue that was attached to one of the appellants' pleadings; however, that information was never admitted at trial.

Third, the commissioners court order did not result in precincts being left without an election judge on election day. J.S. 3, 11. While it is correct that the October 8 order did not name judges in some precincts, both the order and the statute provide a method by which judges are to be appointed to fill vacancies that might exist in the initial list. App. 26a-27a; Tex. Elec. Code Ann., § 32.007. Further, if the position is still vacant on election day, the alternate judge serves as presiding judge. Tex. Elec. Code Ann., § 32.001(b).

B. Summary of different methods of appointing election judges.

While the specific method of appointing election judges that is before the Court in this appeal is the one that was adopted on October 8, 1996, it is necessary to be aware of the earlier methods that were used. Accordingly, the county believes it may be helpful to outline the various methods that have been used in Dallas County for appointing election judges beginning with the time section 5 of the Voting Rights Act was extended to cover Texas and extending through the present.

1. The statutory framework – section 32.002, Tex. Elec. Code

Section 32.002 of the Texas Election Code provides that election judges are to be appointed by the commissioners court. Other than various conditions of eligibility and ineligibility set out in companion statutes, *see* Tex. Elec. Code Ann. §§ 32.051-35.055 (*e.g.*, judge must be a qualified voter but may not be an elected public official, a candidate, campaign treasurer, etc.), the statute does not set out specific criteria for determining whom the commissioners court will appoint. The statute has been precleared by the Attorney General under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

2. Methods used by the commissioners court to determine the list of appointees

In Dallas County, the appointment of election judges involves compilation of a list of several hundred appointees. In 1996, for example, the list of appointees included approximately 500 presiding judges and approximately 500 alternates. In preparing a list of this size the county necessarily used some methodology as the sheer size of the task made it unlikely that each member of the court would be personally acquainted with each of the appointees.[2]

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[2] While the use of a method or formula to prepare a list for the commissioners court's consideration may be necessary in large counties such as Dallas County, that may not be the case in many, if not most, of Texas' 254 counties. Most counties will have a much smaller number of election judges with some

(a) The method used from 1972 until 1983

Presumably, there were criteria that were used by the commissioners court between 1972 and 1983 for determining whom to appoint. To the extent that preclearance is required for a particular method, the method in use on November 1, 1972, which is the coverage date for the Voting Rights Act in Texas, was approved by operation of law. There is no evidence in the record, however, to indicate exactly what method was used at that time.

(b) The Presidential precinct method – 1983-1994

The first methodology shown by the evidence in this case began to be used in 1983. For approximately eleven years beginning in 1983, the commissioners court appointed persons pursuant to a formula by which a Democrat would be appointed as the presiding election judge in each precinct that was carried by the Democratic presidential candidate and a Republican would be appointed as the presiding election judge in each precinct that was carried by the Republican presidential candidate. If a Republican was appointed as the presiding election judge, a Democrat would be appointed as the alternate and *vice versa*. A list of potential appointees would be submitted by the two parties. The formula was not formally set out in any order of the commissioners court,

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having as few as four. When the number of appointees is relatively small it is likely that the commissioners will be personally familiar with each appointee.

and the commissioners court was always free to reject any person recommended to it.

(c) The Senatorial precinct method – 1995

In 1995, the commissioners court adopted its first order that expressly set out a formula to be used in the appointment of election judges. The order acknowledges that the Presidential precinct method was "one of the factors used in appointing election judges and alternates since 1983," and designates that a U.S. Senatorial precinct method will be used "as one of the factors, along with previous performance and other individual qualifications" in appointing election judges and alternates in 1995-97. Because Senator Kay Bailey Hutchinson carried more Dallas County precincts in the 1994 Senate race than President Bush carried in the 1992 Presidential election, the practical effect of using the Senatorial method was to appoint more Republicans and fewer Democrats than would have been appointed under the Presidential method.

(d) The Senatorial precinct method (revised) – September 1996

In September of 1996, the commissioners court adopted a revision of the Senatorial method that presumably would result in the appointment of a larger number of Republicans and a smaller number of Democrats than would occur under the original senatorial model. Assuming that each commissioner acted on a partisan basis, all of the election judges in Dallas County

would be Republicans except in those precincts that were both carried by the 1994 Democratic nominee for the Senate and represented by the sole Democratic commissioner on the commissioners court. The order made it clear that partisan affiliation was only "one of the factors" to be considered by the commissioners court in making its appointments and that "a majority of the Commissioners Court may choose to not appoint any individual." App. 28a-29a. As indicated below, this order was rescinded one month after passage and thus was never implemented.

(e) The October 1996 orders

After passage of the revised Senatorial method in September 1996, it was alleged that preclearance was required for any method by which the commissioners court determined who its appointees would be. As no method or procedure that was unique to Dallas County had ever been submitted for preclearance, it was alleged that the use of formulas allocating positions between Democrats and Republicans was legally unauthorized. Without admitting that the allegations were legally valid, the commissioners court adopted an order on October 8, 1996 rescinding the orders setting out the two versions of the Senatorial method as well as "any and all policies or practices that provided a method of selecting and appointing presiding judges and alternate judges in Dallas County by any method other than that set out in Tex. Elec. Code, § 32.002 or its predecessor statutes." App. 22a. The commissioners court then adopted an

order appointing judges that relied solely on the provisions of section 32.002 and its related statutes. App. 24a. The list of appointees attached to this order named only Republicans as presiding election judges and only Democrats as alternate judges. There was, however, no order indicating that the commissioners court was using any formula or was limiting its discretion as to whom it might appoint.

THE QUESTIONS ARE NOT SUBSTANTIAL

A. The consideration of partisan affiliation by an appointing authority when it determines whom it will appoint is not a voting qualification or prerequisite to voting or a standard, practice or procedure with respect to voting within the meaning of section 5 of the Voting Rights Act.

Not every action affecting the election process is a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" covered by section 5 of the Voting Rights Act. Here, for example, it is generally acknowledged that the statute creating the position of election judge is an election procedure requiring section 5 preclearance. Yet, at the same time all of the parties to this action agree that the actual decisions as to which individuals will be appointed under

that statute is not.[3] The appellants contend, however, that the process by which the commissioners decide which appointments will be filled with Democrats and which will be filled with Republicans is a covered practice. In effect, their position is that the decision to appoint Ms. Smith as election judge for precinct 1 is not an election practice although the decision that the position of election judge for precinct 1 will be filled by a Republican is such a practice. Thus, the issue raised in this appeal is how far, if at all, the preclearance requirement extends into the commissioners court's decision-making process as it determines which individuals will be appointed.

A major difficulty in determining how the Act applies to the commissioners court's consideration of various criteria in the decision-making process as it determines whom it will appoint is that there is no clear line in this context to separate what is an election practice requiring preclearance and what is not. If we assume, for

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[3] The appellants indicated in their Jurisdictional Statement that they

> did not make the claim below that changes in the identity of individuals selected as poll judges are subject to Section 5 preclearance, and do not make such an argument in this Court.

J.S. at 16 n.7. They outlined their position in a more affirmative manner in the district court by stating:

> the appointment or the failure to reappoint a particular person as an election judge does not carry with it any change in a standard, practice or procedure, and thus is not a Section 5 covered change.

Plaintiffs' Brief in Support of Preliminary Injunctive Relief at 11, n. 3.

example, that a county adopts a list that appoints only Democrats as election judges, we can almost certainly also conclude that partisan affiliation was a major factor considered by the commissioners in making the appointment.[4] Has the county by adopting that single list implemented an election practice so that no Republicans can ever be appointed without Justice Department or district court approval? Presumably, the answer is no.[5] What if the appointment list contained only Democrats for the next year, or even for the next ten years? Would we then have an election practice? If so, there must be some specific point that we can identify when the repeated use of an list containing only Democrats matured into an election practice, since at that time it could not be implemented without preclearance. No such point, however, is

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[4] While a list containing representatives of only one party may be the most obvious example of using partisan affiliation as a decision-making factor, it is certainly possible to have a list that is split 50-50, 75-25, or in any other percentage that is just as dependent on party membership even though the relationship between the appointments and party affiliation may not be as immediately apparent.

[5] The county recognizes that repetition is not necessary for an action to be considered as an election practice since even a single act can affect an election. *See NAACP v. Hampton County Election Commission*, 470 U.S. 166, 178 (1985). In this case, however, the act that most directly affects the election process – *i.e.*, the actual appointment of the election judges – is concededly not an election practice requiring preclearance. *See* fn. 2, *supra*. The issue here is whether the use of particular criteria in the decision-making process represents a practice, and it often will be impossible to determine what criteria were used other than by observation over a period of time.

apparent. Further, it is not at all certain in the hypothetical that party affiliation is the only factor being considered by the commissioners court. This is precisely the situation posed in Dallas county by the use of the Presidential precinct method between 1983 and 1994. There was no formal order saying that the commissioners would follow a particular formula, but they admittedly made appointments pursuant to a specific methodology and did so year after year.

In 1995, of course, the commissioners court adopted a formal order saying that they would use the Senatorial election results "as one of the factors, along with previous performance and other individual qualifications" in determining whom to appoint. App. 31a. Certainly, the reference to "previous performance" or to "other individual qualifications" offers little insight into what might be considered in the decision-making process or to what role any of the three factors might play. Further, for every one of the three articulated criteria, there may have been several unarticulated ones. The problem is that review of the criteria amounts to review of the commissioners' thought process. Even when some aspects may be set out in writing, the matter is so subjective and ultimately unknowable that it is not amenable to principled review. This is one of the considerations that this Court relied on in *Presley v. Etowah County Commission*, 502 U.S. 491 (1992). There the Court rejected the argument that changes in a governmental body's decision-making authority were subject to section 5 preclearance in part because there was no principled way to determine when those changes in decision-making authority related to

voting and when they did not. *Id.* at 504. Here the difficulty in determining which criteria were used in the decision-making process and when and if an action matures into an election practice presents even greater difficulty.

It is also important to recognize exactly what an order outlining criteria the commissioners court will consider actually does. This order is not like a statute enacted by a higher authority that imposes a duty on the commissioners court or circumscribes its actions. The order was passed by the commissioners court and can be rescinded or ignored by the commissioners court. While it says the commissioners court will consider the election returns from the 1994 U. S. Senate race in making the list, there is nothing to preclude the court from adopting a list that bears no relationship to the results of the Senate race. All the order ultimately represents is a public agreement among the commissioners of how they will compile a list that can receive the three votes that represent a majority of the commissioners court. If three commissioners believe a different way of compiling the list would be preferable, they are not constrained by the order from pursuing that other course. In fact, the 1995 order states on its face that it will be used from 1995 through 1997, App. 31a-32a, yet it was abandoned in September 1996, App. 28a-29a, and again in October 1996. App. 22a-27a. In effect, the order is nothing more than a statement of internal operating policy and ultimately does not bind any citizen or even the commissioners themselves.

It is also important to recognize, as the district court did, that the "informing principle" of all the plans at issue is the allocation of appointments on the basis of

partisan affiliation. App. 3a. As the fortunes of the political parties shift with the election results, the composition of the appointments shift to reflect the new partisan order. The formulas have varied from the familiar winner-take-all principle to different plans for allocating appointments between the two parties. There is an obvious reluctance to extend judicial oversight under the Voting Rights Act to the assignment of political power on the basis of partisan strength. *See e.g., Thornburg v. Gingles*, 478 U.S. 30, 83 (1986) (White, J. concurring) (A Republican victory, even though most blacks supported the losing Democrats "is interest group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 [of the Voting Rights Act]"); *Whitcomb v. Chavis*, 403 U.S. 124, 150-153 (1971) (refusing to find racial discrimination under the Fourteenth Amendment when a pattern of Republican victories denied black voters the opportunity to elect the candidates they preferred). Although these cases do not directly address section 5, they do suggest the very understandable reluctance of the courts and Congress to bring purely partisan determinations within the scope of the Voting Rights Act.

While there will sometimes be instances when other factors may weigh more heavily in the balance, partisan considerations are a traditional and major consideration in the appointment process at virtually every level of American government at which the appointing authority is elected on a partisan basis. When a governor, county judge, county commissioner, or other official is elected on the Democratic ticket, one can be almost certain that affiliation with the Democratic party will be a factor in

determining who will be appointed by that official. If the official's successor is elected on the Republican ticket, the criterion for potential appointees will change so that preference will be given to Republicans. It is possible that the change will even be reflected in writing, as for example, in a memorandum from the governor to his or her appointments secretary or in a commissioners court order. It is inconceivable, however, that Congress ever intended that this sort of change that does nothing more than reflect partisan electoral success would require preapproval by the Attorney General or the district court of the District of Columbia.

Finally, the expansive interpretation of section 5 urged by appellants would raise serious constitutional concerns. Section 5 was determined to be constitutional by balancing the significant federalism cost inherent in section 5 against the extraordinary circumstances existing at the time of the passage of the Voting Rights Act. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966); *see also, Miller v. Johnson*, ___ U.S. ___, 115 S.Ct. 2475, 2493 (1995) ("our belief in *Katzenbach* that the federalism costs exacted by Section 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this case."). Interpretation of section 5 in a manner that causes the appointment-decision-making process to be subject to review would pull the statute into a zone of doubtful constitutionality. The Act should be interpreted to avoid this constitutional issue.

B. Even if the decision-making process is covered by section 5, a jurisdiction may abandon an unprecleared, legally unenforceable practice and reinstate the most recently precleared practice.

The Voting Rights Act is structured so that the practice in effect on the coverage date, which in Texas is November 1, 1972, is frozen as a benchmark, and no change can be made in that practice without the approval of the district court in the District of Columbia or the Attorney General. Unless and until such approval is obtained, any change is legally unenforceable. *Connor v. Waller*, 421 U.S. 656 (1975). Once preclearance of a change is obtained, the new practice becomes the benchmark against which any subsequent change must be measured. *Gresham v. Harris*, 695 F. Supp. 1179 (N.D. Ga.) (3-judge court), *vacated and remanded for consideration of mootness*, 488 U.S. 978 (1988), *aff'd after remand*, 495 U.S. 954 (1990). The Attorney General, who has primary enforcement authority under the statute, has implemented regulations that expressly provide that an unprecleared practice cannot serve as a benchmark. Specifically, the regulation states:

> If the existing practice or procedure upon submission was not in effect on the jurisdiction's applicable date for coverage . . . and is not otherwise legally enforceable under section 5, it cannot serve as a benchmark, and except as provided in paragraph (b)(4) of this section,[6] the

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[6] Section (b)(4) relates to the situation when there is no preexisting benchmark, as for example when a governmental entity is created after the applicable date for the Act's coverage. That exception is not relevant here.

> comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.

28 C.F.R. § 51.54(b)(1).

The appellants allege that Dallas County has gone through a series of four covered changes in the appointment of election judges and that none have been precleared. Assuming for the moment that the appellants are correct and that the various changes required preclearance, what would be Dallas County's obligation? Obviously, the county would not be permitted to use any of the unprecleared changes as they would be legally unenforceable. Its sole option would be to revert to the last legally enforceable practice, which in this case would be the last precleared practice or, if no practice had been precleared, the practice in effect on November 1, 1972. Of course, that is exactly what Dallas County did here. When it was alleged that the earlier practice required preclearance but had not been precleared, the county reverted to the last precleared practice – *i.e.*, the procedures set out in section 32.002 of the Election Code, which had been precleared in 1985.

This is mandated by the principles inherent in the structure of the Voting Rights Act – (1) the only valid practice is the most recently precleared practice, (2) if no practice has been precleared, then the practice in effect on the coverage date is the valid practice, and (3) unprecleared changes are legally unenforceable. Contrary to appellants' suggestion, the reversion to the last precleared practice is not inconsistent with *Perkins v. Matthews*, 400 U.S. 379 (1971). That opinion does not relate at all to the situation presented here. In *Perkins*, the city

used a practice on the coverage date, which in the case of Mississippi was November 1, 1964, that was different than the one authorized by Mississippi law. Under the Act, the procedure "in force and effect" on November 1, 1964, became the benchmark and could not be abandoned absent preclearance of the proposed change. The issue was whether the procedure that was "in force and effect" was the one that was actually used or instead was the one the city should have used under state law. This Court determined that the procedure that was actually used on the coverage date was the one in force and effect and therefore provided the benchmark against which future changes must be measured. *Id.* at 394-95; *see also City of Lockhart v. United States*, 460 U.S. 125, 132-33 (1983). It is difficult to understand how the *Perkins* decision, which is based on an interpretation of the statutory language that governs the determination of the practice that is afforded initial benchmark status, has any relevance to the very different question of what happens when that benchmark is abandoned through the use of an unprecleared change.

The effect of the appellants' position is that once an unprecleared, legally unenforceable change is implemented, the county would not be able to abandon that practice without a declaratory judgment from the district court in the District of Columbia or preclearance from the Attorney General. If that is the law, it represents a fundamental change in voting rights jurisprudence and leads to impractical and nonsensical results. For example, the appellants' theory would freeze jurisdictions into legally unenforceable practices rather than encouraging them to voluntarily revert to the only legally enforceable practice. Similarly, it would either give benchmark status to an

unprecleared practice – a concept fundamentally at odds with the rationale of the Act – or would put the Attorney General in the position of picking and choosing among various options, including ones that had never received section 5 preclearance and had been expressly rejected by the governmental body.[7] Such an expansive interpretation of the Act would raise serious constitutional issues. See discussion at p. 13, *supra*.

Certainly, the four cases cited by the appellants do not suggest that some different view of the rationale and structure of the Act is held by the district courts. *See* J.S. 26-28. One of the cases cited by appellants – *NAACP, DeKalb County Chapter v. Georgia*, 494 F. Supp. 668 (N.D. Ga. 1980) (3-judge court) – appears to be referring to abandonment of a precleared rather than of an unprecleared practice.[8] If so, it is clearly inapplicable.

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[7] For example, the appellants urge that the Presidential precinct method in use between 1983 and 1994, the 1995 Senatorial precinct method, the September 1996 revised Senatorial precinct method, and the October 1996 order appointing only Republicans as presiding judges are all practices requiring preclearance. The relief the appellants seek is reversion to the Presidential precinct method. In order to obtain his result it would be necessary for the Attorney General to choose a method that had never obtained the legal status that comes from preclearance and that had been rejected by the commissioners court in favor of other policy choices.

[8] The district court does not refer to the practice that was abandoned as being unprecleared. In that case the county had routinely approved requests to conduct voter registration drives but then adopted a formal order saying that it would no longer approve such requests. While it seems unlikely that the county had made a submission asking for preclearance of its "routine" practice of approving voter registration drives, it did ask for

Two cases – *City of Rome v. United States*, 472 F. Supp. 221 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980) and *City of Pleasant Grove v. United States*, C.A. No. 80-2589 (D.D.C. October 7, 1981) (unreported) – relate merely to whether a city that has implemented multiple annexations may temporarily fail to enforce some in an effort to submit the various annexations one at a time so that their cumulative effect is masked. In fact, the option the three-judge court gave the city in *Pleasant Grove* is entirely consistent with Dallas County's actions here. The court gave the city the choice of submitting all of the annexations as a single package or having its section 5 declaratory judgment action dismissed. App. 63a-64a. Dismissal of the declaratory action would mean that the annexations would not be precleared and that the city would revert to the boundaries as they existed prior to the unprecleared annexations. That, of course, is exactly what Dallas County is doing here. Upon the allegation that the changes regarding the decision-making criteria used in

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preclearance of the individual instances in which drives were authorized. *DeKalb*, 494 F.Supp. at 673 and n.3. Indeed, the court referred to the submissions to the Department of Justice as the means by which the procedure was "formalized." *DeKalb*, 497 F. Supp. at 673. No one, other than the appellants, appears to have read *DeKalb* to refer to abandonment of unprecleared changes. The *DeKalb* court itself used a hypothetical based on the abandonment of a precleared practice. *DeKalb*, 494 F. Supp. at 677. Further, the only court that has cited *DeKalb* in the context of abandonment of a voting practice did so in the context of applying its teaching to situations in which there were precleared plans. *Gresham v. Harris*, 695 F. Supp. at 1183.

appointing election judges had been implemented in violation of section 5, the county reverted to the last system that had been precleared.

The remaining case – *League of United Latin American Citizens #4552 (LULAC) v. Roscoe Ind. Sch. Dist.*, C.A. No. 1:96-CV-010-C (N.D. Tex. 1996) (3-judge court) (unreported) – appears to be the single case that possibly suggests that it is necessary to obtain preclearance prior to shifting from an unprecleared change to a precleared one, although the district court's summary order offers no explanation of its reasoning and the facts must be gleaned from sources outside the order. If the *Roscoe* court is holding that preclearance is required to abandon an unprecleared change in favor of a precleared one,[9] we respectfully suggest it is incorrect and is out of step with the general thrust of voting rights jurisprudence.

C. A fair reading of the district court opinion does not reveal the departures from established Voting Rights jurisprudence suggested by the appellants.

The primary thrust of appellants' argument is not that this case presents an unsettled and important issue of law but rather is that the district court failed to follow

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[9] Since the briefs indicate that the school district was phasing in the precleared system, the practice that was actually before the court was a hybrid of the precleared and unprecleared systems. As this intermediate system had not been precleared, it is possible to construe *Roscoe* as requiring preclearance only for the hybrid system. Given the absence of any discussion by the court, however, it is impossible to know whether the district court was making that distinction.

long-established and well-recognized rulings of this Court. Indeed, the first three points in appellants' argument are that the district court erred (1) in considering the purpose or motivation behind the commissioners court's action, J.S. 12-16, (2) in determining that the Attorney General's 1985 preclearance implicitly precleared the county's pre-1985 practices. J.S. 17-20, and (3) in providing a discretionary acts exemption from the preclearance requirements of section 5. J.S. 20-24.[10] A fair reading of the district court opinion does not suggest that any of these contentions is based on an accurate interpretation of the court's order.

The county agrees that the scope of a section 5 enforcement court's inquiry is strictly limited to the issue of (1) whether section 5 applies, (2) if so, whether preclearance has been obtained, and (3) if not, what relief is appropriate. *E.g., Lopez v. Monterrey County*, ___ U.S. ___, 117 S.Ct. 340, 349 (1996). The appellants suggest that the district court exceeded its authority by "concluding that partisan politics and not racial discrimination motivated the changes in the procedures used to select election judges" and thus improperly invaded the province of the district court of the District of Columbia or the Attorney General. J.S. 13. There is absolutely nothing in the district court opinion, however, to suggest that the court made any conclusion regarding the substantive effect of the

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[10] The appellants list two of these issues as the second and third of the "questions presented" by this appeal. The county has not included them in its list of the questions presented as it believes the issues are based on a strained and inaccurate reading of the district court opinion.

appointments insofar as potential racial discrimination is concerned.

The court did recognize that partisan considerations were a driving force in the appointment process. That is hardly a surprising conclusion. Indeed, the parties stipulated as much, App. 12a-15a, and the appellants, who are now complaining that the district court analyzed the case in terms of partisan decision-making, expressly asked that court to make just such an analysis.[11] What the district court concluded was that the decision to vest the appointing authority in the commissioners court – a governmental body whose members are elected in partisan elections – necessarily encompassed the concept that the appointments might shift between Democrats and Republicans as those parties' relative power on the commissioners court shifted. The district court concluded that the shifts in the political affiliations of election judges was nothing more than a reflection of the shifts in partisan power on the commissioners court and was not a change in an election practice or standard. Rather than deciding, as the appellants contend the district court did, whether the changes in allocation were discriminatory, the district court merely determined that the changes in partisan affiliation did not represent a change in an election practice or procedure – an inquiry that is clearly within the scope of the authority of the district court.

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[11] The plaintiffs/appellants argued that preclearance was required because "the method and criteria used to make selections of election judges has changed: they have changed from essentially a bi-partisan approach to a partisan one. . . ." Plaintiffs' Brief in Support of Preliminary Injunctive Relief at 11, n. 3.

Similarly, the language of the district court opinion does not support the conclusion that the court was relying on an "implicit" preclearance of the use of a particular partisan formula. The appellants stretch the district court's statement that the 1985 preclearance of section 32.002 "precleared the process of selecting election judges in Texas" to suggest that the court was finding that the Department implicitly "precleared the 1983 change to a Presidential precinct method [as well as] the changes in 1995 and 1996." J.S. 17 and 18. The county recognizes that preclearance does not occur by implication, *McCain v. Lybrand*, 465 U.S. 236 (1984), and has never contended that the 1985 preclearance approved a particular formula or method other than the one set out in the statute. Nothing in the district court order suggests that it was finding that a particular method or formula was being approved. What the district court did conclude is that when the Attorney General approves a statute vesting the appointment authority in a group of persons who are elected on a partisan basis, it is reasonable to assume that it was contemplated that those persons might consider partisan affiliation when they make those appointments,[12] just as they might consider who supported them in their election efforts, who opposed them, who has done a good job in the past as an election judge, who has done a bad job, and many other factors that are likely to

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[12] For example, if a statute entrusted certain appointments of primary election officials to the county party chair, no one would suggest that preclearance was required of the Democratic party chair's practice of appointing Democratic party activists or of the Republican party chair's practice of appointing Republican party activists.

go into the decision-making process. When the commissioners court assigns greater or lesser weight to any of these factors, it is not a change in an election procedure just as it is not a change when one party or the other becomes more powerful on the commissioners court and effects a change in the partisan mix of the election judges.

Finally, it is incorrect to suggest that the district court found any sort of blanket exemption for actions that are within a governmental body's discretionary authority. That is not what the district court held and is not what Dallas County is contending. Unquestionably, discretionary decisions may be covered by section 5. The district court, far from carving a blanket exception, expressly recognized that there could be situations in which discretionary decisions taken under the authority granted by section 32.002 would require preclearance. App. 4a. It simply found that considerations of partisan affiliation in the appointment process did not constitute a practice or standard that required preclearance. That decision, however, was based on an analysis of the specific issue and not on any conclusion or belief that discretionary decisions were somehow exempt under the Act.

D. The appeal comes before the Court on an incomplete record that does not contain the evidentiary basis necessary to sustain the appellants' argument and reverse the district court.

The Voting Rights Act is structured to require jurisdictions that are covered by section 5 of the Voting Rights Act to obtain a declaratory judgment from the district court of the District of Columbia or preclearance from the

Attorney General before they implement a voting qualification or prerequisite to voting or a standard, practice, or procedure relating to voting that is different than that in effect on the coverage date. In the case of Dallas County, the coverage date is November 1, 1972. The practice in effect on November 1, 1972 becomes the benchmark against which subsequent changes must be measured. If, however, there is an approved change from the 1972 standard, that new practice becomes the benchmark. *Gresham v. Harris*, 695 F. Supp. 1179 (N.D. Ga.) (3-judge court), *vacated and remanded for consideration of mootness*, 488 U.S. 978 (1988), *aff'd after remand*, 495 U.S. 954 (1990); 28 C.F.R. § 51.54(b)(1).

Accordingly, the determination of the benchmark is a critical issue in any section 5 case as it is necessary to know what the benchmark is in order to determine if there has been a change that triggers the application of that section of the Act. In this case there are two potential standards that might be considered to be approved practices. One is the 1985 enactment of section 32.002 of the Texas Election Code that establishes the procedure for the appointment process and that was precleared by the Attorney General on August 16, 1985.[13] The October 8, 1996 order appointing election judges is in strict compliance with that provision.

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[13] The predecessor to section 32.002 was in effect on November 1, 1972 and became a benchmark. Subsequent amendments, which did not change the general tenor of the statute, were precleared by the Attorney General. Thus, section 32.002 operates as a benchmark whether by virtue of its existence on November 1, 1972 or of the subsequent preclearance of the amendments and codification.

The appellants' argument, however, is based not so much on the procedure for the appointment, but on the formal and informal criteria used by the commissioners court when it determines whether its appointees will be Democrats or Republicans. If this aspect of the decision-making process is an election practice within the meaning of section 5, then the manner by which such decisions were made on November 1, 1972 becomes of critical importance. As the district court notes in a footnote on page 2 of its order and as appellants admit in footnote 12 of the Jurisdictional Statement, the record is silent on that point. *See* App. 2a, note; J.S. 25, n. 12. The appellants had the burden on that issue, but they have not presented the Court with a sufficient record to determine whether the current procedure represents a change from the benchmark. In the absence of a full record on the legal issues presented by the appeal, it would be improvident to afford this matter plenary consideration. *C.f., Wainwright v. City of New Orleans*, 392 U.S. 598 (1968); *Johnson v. Massachusetts*, 390 U.S. 511 (1968); *Smith v. Mississippi*, 373 U.S. 238 (1963); *Mitchell v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960) (all dismissing writs of certiorari as improvidently granted due to insufficiency of the record).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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(3)

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In The

Supreme Court of the United States

October Term, 1996

B.C. FOREMAN, IDA CLARK, OTIS TARVER, DOMINIC DE LA CRUZ, LOUIS DAVIS, and MANDY PESINA,

Appellants,

v.

DALLAS COUNTY, TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, Dallas County Judge; JIM JACKSON, JOHN WILEY PRICE, MIKE CANTRELL, and KENNETH MAYFIELD, Dallas County Commissioners; and BRUCE SHERBET, Elections Administrator of Dallas County, Texas,

Appellees.

On Appeal From The United States District Court For The Northern District Of Texas

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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14 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. APPELLEES IGNORE THE STATUTORY TEXT REQUIRING PRECLEARANCE FOR "ANY" CHANGE IN A "STANDARD, PRACTICE, OR PROCEDURE WITH RESPECT TO VOTING"... 1

A. "With respect to voting"..... 2

B. "Standard, practice, or procedure" 3

II. APPELLEES' ALTERNATIVE ARGUMENT WOULD DISCOURAGE COMPLIANCE WITH, AND THEREBY EVISCERATE, SECTION 5..... 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Allen v. State Bd. of Elections, 393 U.S. 544 (1969) 5

Bush v. Vera, 116 S. Ct. 1941 (1996) 6

Connor v. Waller, 421 U.S. 656 (1975) 5

Dougherty County Bd. of Educ. v. White, 439 U.S. 32 (1978) 6

Georgia v. United States, 411 U.S. 526 (1973) 4

Harris v. Graddick, 593 F. Supp. 128 (M.D. Ala. 1984) 2

Lopez v. Monterey County, 117 S. Ct. 340 (1996) 5, 8

McCain v. Lybrand, 465 U.S. 236 (1984) 9

Morse v. Republican Party, 116 S. Ct. 1186 (1996) 7

NAACP, DeKalb County Chapter v. Georgia, 494 F. Supp. 668 (N.D. Ga. 1980) 4, 7

NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1985) 4

Perkins v. Matthews, 400 U.S. 379 (1971) 5

Presley v. Etowah County Commission, 502 U.S. 491 (1992) 2, 6

United States v. Board of Supervisors of Warren County, 429 U.S. 642 (1977) 5

Welsh v. United States, 398 U.S. 333 (1970) 4

Young v. Fordice, No. 95-2031 (U.S. March 31, 1997) 5, 7-9

TABLE OF AUTHORITIES – Continued

Page

STATUTES, REGULATIONS, AND RULES

42 U.S.C. § 1973 2
§ 1973c ..... *passim*
28 C.F.R. § 51.12 (1996) 8
28 C.F.R. § 51.54(b) (1996) 8
28 C.F.R. pt. 51, App. (1996) 7
Fed. R. Civ. P. 12(b)(6) 9

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

Contrary to the impression appellees attempt to create, this is a simple case. Virtually all the relevant facts were stipulated. App. 11a-17a. It is undisputed that: (1) dating back at least to 1983, appellees enacted or administered a series of changes in the standards for selecting and appointing election judges in Dallas County; and (2) none of those changes was precleared under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *See* Motion to Affirm at i, 1-7 [hereinafter Mot.]. The District Court's decision denying injunctive relief is less than four pages long. App. 1a-4a. It neither quotes the relevant statutory text nor cites a single case interpreting that text – perhaps because its holding conflicts with Congress's clearly expressed intent and with every Section 5 coverage case ever decided by this Court.

Against this backdrop, it is not surprising that appellees devote 25 pages to muddying the waters. They do this, first, by ignoring the express terms of the statute, which clearly mandate preclearance of changes in "any . . . standard, practice, or procedure with respect to voting," 42 U.S.C. § 1973c, and, second, by proposing a novel interpretation of Section 5 that would discourage compliance with, and ultimately eviscerate, the Act.

I. APPELLEES IGNORE THE STATUTORY TEXT REQUIRING PRECLEARANCE FOR "ANY" CHANGE IN A "STANDARD, PRACTICE, OR PROCEDURE WITH RESPECT TO VOTING."

Appellees are simply wrong to suggest that the changes at issue here did not involve any "standard, practice, or procedure with respect to voting" within the meaning of Section 5. 42 U.S.C. § 1973c. Indeed, they cannot even pinpoint the part of the above-quoted

language that supposedly is too narrow to encompass those changes.

A. *"With respect to voting"* – There can be no doubt that any change in a standard, practice, or procedure regarding "election judges" in Texas would be a change "with respect to voting" as that term is used in Section 5. Appellees effectively concede this point. *See* Mot. at 7 ("the statute creating the position of election judge is an election procedure requiring section 5 preclearance").

Yet the *only* case appellees cite in which this Court (or any other court) held that a change fell outside Section 5's scope, *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), was a case interpreting the statute's "with respect to voting" language. *Id.* at 494. In *Presley*, this Court refused to require Section 5 preclearance of changes that reallocated decisionmaking authority among certain elected county officials, largely because such a requirement would subject to federal scrutiny local governments' routine internal operations (most of which bear no direct relationship to voting) and thus "would work an unconstrained expansion of [Section 5's] coverage." *Id.* at 503-04, 506, 510.

Appellees attempt to make a similar argument here, claiming that appellants' interpretation of the Act would open virtually all state and local governmental appointments to Section 5 challenges, which in turn would raise serious constitutional concerns. Mot. at 12-13. That claim is a red herring. The method of selecting and appointing Dallas County's election judges is covered by Section 5 solely because they are *election* judges. Their jobs bear an obvious and "direct relation to voting and the election process." *Presley*, 502 U.S. at 503; *see* J.S. 2-3, 16 (describing election judges' duties); *cf. Harris v. Graddick*, 593 F. Supp. 128, 132 (M.D. Ala. 1984) (holding that appointment of election officials is a "standard, practice, or procedure" under Section 2 of the Act, 42 U.S.C. § 1973). By contrast, the vast majority of governmental appointees lack any direct tie to "voting and the election process" and therefore fall clearly outside the plain text of Section 5.

Thus, appellees' constitutional concerns are entirely misplaced.

B. *"Standard, practice, or procedure"* – Thus, the real question presented here is whether the contested changes were changes in a *"standard, practice, or procedure* with respect to voting." 42 U.S.C. § 1973c (emphasis added). Appellees – again ignoring the statute's plain language – have devised three principal lines of argument. None can withstand scrutiny.

1. Appellees suggest that the County's various methods for selecting election judges are not standards, practices, or procedures because they could be "rescinded" or "abandoned" at any time by a simple majority vote of the Commissioners Court. *See* Mot. at 11. Of course, the same could be said of *any* state or local enactment covered by Section 5. Absent some constitutional restraint, legislative bodies are *always* free to rescind or abandon previously enacted laws. If appellees' argument were correct, Section 5 would cover nothing.

2. Appellees argue that each of the changes challenged here was merely "a statement of internal operating policy" or a voluntary guideline that the Commissioners Court set for itself, and hence lacks the gravity of a "standard, practice, or procedure." Mot. at 8-12. In appellees' view, these guidelines are more akin to the decision whether to reappoint a particular individual as an election judge, a decision that clearly would fall outside Section 5's scope. *Id.* at 7-8, 10 & n.3.

That argument is belied, however, by the County's own description of its methods for choosing election judges. In its brief, *id.* at i, 1-6, 10, 24, the County refers to one or more of its various approaches as a "formula," a "method," a "specific methodology," and even a "standard" – the very term Congress adopted in drafting Section 5. And the contemporaneous documents – the

Commissioners Court's 1995 and 1996 orders – expressly refer to the methods for choosing election judges as "policies or practices" or as "policies and procedures." App. 22a, 32a. At bottom, then, appellees ask this Court to hold that each of their (self-described) "standards," "policies," "practices," and "procedures" somehow fails to qualify as a "standard, practice, or procedure" under Section 5. If their argument is correct, then we surely reside in "an Alice-in-Wonderland world where words have no meaning." *Welsh v. United States*, 398 U.S. 333, 354 (1970) (Harlan, J., concurring).

Appellees counter that at least one of the County's policies or practices was not reduced to writing. Mot. at 4, 10. But the 1995 and 1996 practices challenged here were enacted as formal, written orders of the Commissioners Court. App. 22a-32a. In any event, Section 5 "reaches informal as well as formal changes." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985); *see also NAACP, DeKalb County Chapter v. Georgia*, 494 F. Supp. 668, 676-77 (N.D. Ga. 1980) (Section 5 is triggered when a county replaces a "confused" voting practice with a "consistent[ly]" applied one).

Appellees also claim that the various policies and practices adopted in 1983, 1995, and 1996 were just single "factors" in multi-factor sets of articulated and unarticulated criteria for choosing election judges. *See* Mot. at 4-13. But there is not a stitch of evidence in the record below suggesting that the commissioners ever deviated from the methods described in the briefs, *see* J.S. 2-9; Mot. at 2-7. Appellees' point is purely conjectural and hence should carry no weight. *See Georgia v. United States*, 411 U.S. 526, 531 (1973) (Section 5 is concerned "with the reality of changed practices as they affect [minority] voters").

3. Appellees contend that application of Section 5 – a statute designed to combat *racial* discrimination in voting – does not apply here because the Commissioners

Court merely responded to changes in the County electorate's *partisan* balance; and they accuse appellants of attempting "to bring purely partisan determinations within the scope of the Voting Rights Act." Mot. at 12. The District Court adopted essentially the same argument. *See* App. 3a-4a. It is wrong, for three reasons.

First, questions concerning the commissioners' actual *purpose* or *motive* in enacting the various changes, *see* Mot. at 8-13; App. 3a-4a, are exclusively reserved to the Attorney General in the administrative preclearance process, or to the District Court for the District of Columbia in a *substantive discrimination* declaratory-judgment action, and should play no role in a Section 5 *coverage* case. This Court has not hesitated to reverse the judgments of district courts that failed to heed that distinction. *See, e.g., Lopez v. Monterey County*, 117 S. Ct. 340, 348-49 (1996); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 646-47 (1977) (*per curiam*); *Connor v. Waller*, 421 U.S. 656, 656 (1975) (*per curiam*); *Perkins v. Matthews*, 400 U.S. 379, 385-86 (1971); *Allen v. State Bd. of Elections*, 393 U.S. 544, 555 n.19, 558-59 (1969). What matters here is that the various methods for selecting election judges reflect the Dallas County Commissioners' discretionary policy choices, which have at least the *potential* for racial discrimination and therefore should be evaluated by the appropriate federal authorities in Washington. *Young v. Fordice*, No. 95-2031, slip op. at 10-12 (U.S. Mar. 31, 1997); *Lopez*, 117 S. Ct. at 348-49.

Second, appellees' argument would lead to absurd results. If it is the partisan nature of the County's methods for selecting election judges that saves them from Section 5's preclearance requirement, then *purely* "procedural" changes that make no reference to party – *e.g.*, requiring the commissioners to approve election-judge appointments by unanimous vote, or by simple-majority vote – would certainly fall within Section 5, while "substantive" changes like those challenged here (which effectively rendered all Democrats ineligible to

serve as election judges) would fall outside Section 5. In Dallas County, where most whites vote Republican and where, as a plurality of this Court recently recognized, there is "evidence that 97% of African-American voters . . . vote Democrat," *Bush v. Vera*, 116 S. Ct. 1941, 1956 (1996), such a result would be bizarre. Allegedly "partisan" changes – despite being rife with potential for racial discrimination – would not be subject to preclearance, while strictly procedural changes would be. That cannot be Congress's intent. *See Presley*, 502 U.S. at 505 (Congress mandated preclearance for every change with respect to voting that has even the "potential for [racial] discrimination"); *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 42 (1978) (same).

Third, appellees, following the District Court's reasoning, assert that appellants would use Section 5 to "freeze the partisan choices" of Dallas County voters. App. 3a. In fact, that charge is more properly aimed at appellees. The Presidential precinct method used from 1983 to 1995 – which appellants support in substance – fully allowed for partisan shifts. For example, in the mid-1980s, Republican election judges replaced Democrats in all precincts that had voted for President Carter in 1980 but for President Reagan in 1984. It is the appellees' 1996 methods that have effectively insulated the selection process from the ebb and flow of partisan tides by eliminating every single Democratic election judge. Hence, appellees' claim to be the champions of free competition between the political parties rings hollow.

II. APPELLEES' ALTERNATIVE ARGUMENT WOULD DISCOURAGE COMPLIANCE WITH, AND THEREBY EVISCERATE, SECTION 5.

Appellees advance an alternative argument that was raised in, but not addressed by, the District Court: Even if the method for selecting and appointing election judges *is* a "standard, practice, or procedure with respect to voting" and therefore subject to Section 5's preclearance

requirements, the County is always free to abandon an unprecleared (and hence legally unenforceable) method and to reinstate the most recent precleared method. Mot. at 14-19. Here, the parties have stipulated that no method was ever precleared, App. 15a, so the most recent method that is legally enforceable under Section 5 would be "that in force or effect on November 1, 1972," the "coverage date" that applies to Texas and its counties. 42 U.S.C. § 1973c; *see* Mot. at 14-16, 24-25. Thus, appellees contend that their October 1996 decision to return to the method allegedly in effect in 1972 need not be precleared, regardless of its potential for racial discrimination. They are wrong, for three reasons.

First, the County's novel approach would "open[ ] a loophole in the statute the size of a mountain." *Morse v. Republican Party*, 116 S. Ct. 1186, 1213 (1996) (Breyer, J., concurring in the judgment); *see also NAACP, DeKalb County*, 494 F. Supp. at 677. Under appellees' theory, a county that had submitted each of its previous changes for Section 5 review would be barred from returning to a discriminatory policy or practice, as Congress intended. But a neighboring county that had consistently flouted Section 5 by *never* seeking preclearance would be at liberty to return to the voting standards, practices, and procedures that were in effect on the relevant coverage date (November 1, 1972 in Texas; November 1, 1964 in the Deep South, *see* 28 C.F.R. pt. 51, App. (1996)). The law-abiding county would be subject to federal review, while the law-breaking county could revert to practices from the Jim Crow era. Such a perverse result, rewarding local governments that intentionally evade the Voting Rights Act, cannot possibly reflect Congress's intent. Yet that result is precisely what Dallas County asks this Court to condone.

Second, appellees' argument flies in the face of the statute's plain text, as most recently interpreted in *Young v. Fordice*, *supra*. *Young* held that a voting-related change is covered by Section 5 if the new practice or procedure differs significantly from the one that previously was *in*

fact " 'in force or effect.' " *Id.*, slip op. at 8-13 (quoting Section 5). Whether the previous baseline practice or procedure was precleared (or legally enforceable) is simply irrelevant to the inquiry. *See id.* at 8-10; *see also Lopez*, 117 S. Ct. at 348. Here, it is undisputed that the 1983 method was in effect for twelve years; hence it became part of the baseline for judging whether the 1995 change was covered by Section 5. And it is undisputed that the 1995 method was in effect for a full year; hence it became part of the baseline for judging the 1996 change. Similarly, Dallas County must seek preclearance of the current (October 1996) method simply because it is different from the method previously in force and effect – regardless of whether that previous method had been precleared. *See Young*, slip op. at 8-13; *see also* 28 C.F.R. § 51.12 (1996) ("Any change affecting voting, even though it . . . returns to a prior practice or procedure, . . . must meet the section 5 preclearance requirement.").[1]

Third, even if appellees' legal argument was not so manifestly wrong as a matter of text, precedent, and policy, it would fail on the facts of this case. Contrary to appellees' brief, Mot. at 2, appellants' amended complaint challenged the County's failure to preclear *all four* changes (*i.e.*, the 1983, 1995, and September 1996 – as well as the October 1996 – changes). Because it is undisputed that each of those four methods is different from one another, *see* J.S. 2-9; Mot. at 2-7, at least three must be "different from [the method] in force or effect on November 1, 1972." 42 U.S.C. § 1973c. Even if the Court accepted the County's assertion that the October 1996 and November 1972 methods are in fact identical – an assertion that,

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[1] Appellees go astray, Mot. at 14-19, 24-25, by repeatedly confusing the concept of "baselines" in coverage cases, *see Young*, slip op. at 8-10; 28 C.F.R. § 51.12 (1996), with the entirely distinct concept of "benchmarks" in substantive-discrimination cases, *see Young*, slip op. at 16; 28 C.F.R. § 51.54(b) (1996). Benchmarks must be legally enforceable under Section 5; baselines need not be.

as appellees concede, Mot. at 4, 23-25, is unsupported by the record evidence[2] – the other three changes challenged here obviously *cannot* be identical to the November 1972 method and therefore the failure to have them precleared must violate Section 5.

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[2] Citing no authority, appellees also assert that "appellants had the burden" of proving the method in force or effect on November 1, 1972. Mot. at 25. That assertion is incorrect. Congress designed Section 5 to "shift[ ] 'the advantage of time and inertia' to the potential victims of [racial] discrimination." *Young*, slip op. at 12 (citation omitted); *cf. McCain v. Lybrand*, 465 U.S. 236, 249, 255-57 (1984) (burden is on the State to submit a complete and unambiguous description of proposed changes). Moreover, plaintiffs shoulder no burden of proof when appealing from a Rule 12(b)(6) dismissal for failure to state a claim. App. 66a. (Similarly, appellees offer three "corrections" to the statement of the case, Mot. at 1-2, that are both factually inaccurate and irrelevant on appeal from a judgment of dismissal.)

CONCLUSION

Accordingly, this Court should summarily reverse the judgment of the District Court or, alternatively, note probable jurisdiction.

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Nos. 96-987 and 96-1389

In the Supreme Court of the United States

OCTOBER TERM, 1996

B.C. FOREMAN, ET AL., APPELLANTS

v.

DALLAS COUNTY, TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Attorney General, when preclearing changes to a state election code under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, also precleared specific changes that did not appear on the face of the statute, were never identified by the submitting jurisdiction, and were not addressed in the Attorney General's preclearance letter.

2. Whether the district court erred in ruling that a change in the procedures a county uses to select election judges is not a change in voting practices or procedures subject to Section 5 of the Voting Rights Act of 1965.

3. Whether an appeal from the denial of a preliminary injunction in a case under Section 5 of the Voting Rights Act of 1965 is moot when the court has issued an intervening order dismissing the case on the merits.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	8
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Allen v. *State Bd. of Elections*, 393 U.S. 544 (1969)	15
Berry v. *Doles*, 438 U.S. 190 (1978)	19, 20
Blanding v. *DuBose*, 454 U.S. 393 (1982)	13
City of Lockhart v. *United States*, 460 U.S. 125 (1983)	15
Clark v. *Roemer*, 500 U.S. 646 (1991)	10, 12
Conley v. *Gibson*, 355 U.S. 41 (1957)	16
Hishon v. *King & Spaulding*, 467 U.S. 69 (1984)	16
Lopez v. *Monterey County*, 117 S. Ct. 340 (1996)	10, 15, 16, 17, 19
McCain v. *Lybrand*, 465 U.S. 236 (1984)	9, 10, 12
NAACP v. *Hampton County Election Comm'n*, 470 U.S. 166 (1985)	13, 15
Perkins v. *Mathews*, 400 U.S. 379 (1971)	15, 16, 17
Presley v. *Etowah County Comm'n*, 502 U.S. 491 (1992)	14, 18
Reno v. *Bossier Parish Sch. Bd.*, No. 95-1455 (May 12, 1997)	19
Shaffer v. *Carter*, 252 U.S. 37 (1920)	20
Smith v. *Illinois Bell Tel. Co.*, 270 U.S. 587 (1926)	20
Statewide Reapportionment Advisory Comm. v. *Theodore*, 508 U.S. 968 (1993)	19
United States v. *Board of Supervisors of Warren County*, 429 U.S. 642 (1977)	15
United States v. *Sheffield Bd. of Comm'rs*, 435 U.S. 110 (1978)	9-10

Cases—Contined: Page

United States v. *Texas*, No. SA-85-CA-2199 (W.D. Tex. 1985), aff'd mem., 474 U.S. 1078 (1986) 13

White v. *Dougherty County Bd. of Educ.*:

579 F. Supp. 1480 (M.D. Ga. 1984), aff'd mem., 470 U.S. 1067 (1985) 18

470 U.S. 1067 (1985) 18

Whitley v. *Williams*, 393 U.S. 544 (1969) 9

Young v. *Fordice*, 117 S. Ct. 1228 (1997) 10, 12, 18

Statutes, regulations and rule:

Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:

§ 2, 42 U.S.C. 1973 19

§ 4(a), 42 U.S.C. 1973b(a)(1)(F)(iii) 14

§ 5, 42 U.S.C. 1973c ..... *passim*

1969 Tex. Gen. Laws 2662 (Ch. 878, § 2), Tex. Elec. Code Ann., Act 3.01(a) (West Supp. 1970) 2

Tex. Elec. Code Ann. (West 1986):

§ 32.001 4

§ 32.002 ..... 2, 3, 6, 7, 9, 11

§ 32.031 14

§ 32.071 14

§ 32.075 14

§ 63.001 (& Supp. 1997) 15

§ 64.031 14

§ 65.002(b) 14

§ 65.009 15

28 C.F.R.:

Pt. 51, App. 2

Section 51.27(c) 10

Fed. R. Civ. P. 12(b)(6) 7, 16

Miscellaneous:

H.R. Rep. No. 227, 97th Cong., 1st Sess. (1981) 14

In the Supreme Court of the United States

OCTOBER TERM, 1996

Nos. 96-987 and 96-1389

B.C. FOREMAN, ET AL., APPELLANTS

v.

DALLAS COUNTY, TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Appellants, who are former election judges in Dallas County, Texas, brought this action alleging that Dallas County had changed its procedures for appointing election judges in violation of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Under Section 5, a covered jurisdiction may not implement a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" on the date it became covered by the Act, unless it first obtains administrative

preclearance from the Attorney General or judicial preclearance from the United States District Court for the District of Columbia. *Ibid.* Dallas County is a political subdivision of Texas covered under Section 5 with respect to voting practices "different from th[ose] in force or effect on November 1, 1972." *Ibid.*; 28 C.F.R. Pt. 51, App.

2. The parties agree that the current record does not establish the precise procedures Dallas County used to select election judges on November 1, 1972. J.S. 3; Mot. to Aff. 4. On that date, the relevant state statute provided simply that "[t]he [county] commissioners court at its July term shall appoint" for each precinct "one qualified voter as presiding judge of elections" and "one qualified voter as alternate presiding judge." 1969 Tex. Gen. Laws 2662 (Ch. 878, § 2), codified at Tex. Elec. Code Ann., Art. 3.01(a) (West Supp. 1970). In 1985, Texas enacted comprehensive revisions to its election code and submitted those revisions to the Attorney General for Section 5 preclearance. J.S. App. 38a-46a. The provisions concerning the appointment of election judges were recodified in Texas Election Code Ann. § 32.002 (West 1986).[1] In its Section 5 submission, the State ex-

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[1] Section 32.002 provides:

> (a) The commissioners court, at its July term each year, shall appoint the election judges for each regular county election precinct.
>
> (b) Judges appointed under Subsection (a) serve for a term of one year beginning on August 1 following the appointment.
>
> (c) The commissioners court shall fill a vacancy in the position of election judge for the remainder of the

plained that the revisions to Section 32.002 merely "clarif[ied] the beginning date and duration of the appointment of an election judge for a county election precinct." J.S. App. 41a. The Attorney General precleared the revisions to the Texas Election Code on August 16, 1985. *Id.* at 47a-49a. The preclearance letter reminded the State that "officials of the State of Texas and its political subdivisions are not relieved of their responsibility to seek preclearance, pursuant to * * * [S]ection 5, of any changes affecting voting * * * implemented as a result of the provisions of [the precleared revisions]." *Id.* at 48a.

3. The parties have stipulated that, since 1983, the Dallas County Commissioners Court (Commissioners Court) has used four different procedures or standards for selecting election judges, none of which has been precleared. J.S. App. 14a-15a. First, from at least 1983 through the 1994 election, the Commissioners Court appointed election judges using the "Presidential precinct method," under which the nominee (typically the precinct chair) of the party whose candidate carried the precinct in the last

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unexpired term. An appointment to fill a vacancy may be made at any regular or special term of the court.

(d) The county clerk shall recommend a presiding judge and an alternate judge for each precinct and shall submit a list of the recommendations to the commissioners court. The clerk shall also recommend an appointee for each unexpired term. The court shall consider the clerk's recommendation before making an appointment.

(e) Subject to Section 32.003, the judges appointed under this section shall serve in each election ordered by the governor or a county authority in which the regular county election precincts are required to be used.

presidential election was named the presiding election judge, and the opposing party's nominee was named the alternate judge. *Id.* at 12a-13a, 20a-21a; J.S. 4-5; Mot. to Aff. 4. An alternate judge has no independent authority or responsibilities, but simply performs the duties of an election judge when the presiding judge is unable to serve. Tex. Elec. Code Ann. § 32.001 (West 1986); J.S. App. 24a.

The second procedure or standard was adopted on August 8, 1995, when the Commissioners Court enacted a change from the "Presidential precinct method" to the "U.S. Senatorial precinct method." J.S. App. 13a. Under this new standard, the presiding judge came from the party whose senatorial candidate carried the precinct in the last election, while the alternate judge came from the opposing party. *Ibid.*; J.S. 5; Mot. to Aff. 5.

The third procedure, "the Republican precinct method," was enacted on September 3, 1996, when the Commissioners Court ordered that the results of the last U.S. Senatorial race would be used to select election judges only in those precincts in which the Republican candidate had prevailed. In all other precincts, the Election Commissioner who represented that precinct would select the presiding and alternate judges from lists submitted by the parties. J.S. App. 13a-14a.

The final procedure or standard was instituted on October 8, 1996, when the Commissioners Court issued an order rescinding "any and all policies or practices that provided a method of selecting and appointing presiding [election] judges in Dallas County by any method other than that set out in Tex. Elec. Code § 32.002." J.S. App. 14a, 22a. Because Section 32.002 does not prescribe any specific method

for selecting election judges, that order allowed the Commissioners Court to make appointments without reference to any past election results. Under that order, the Commissioners Court appointed only Republican election judges, leaving some positions vacant. *Id.* at 14a-15a. The parties stipulated that the precincts in which the position was left vacant as a result of that order "are primarily precincts in which blacks and/or Hispanics constitute a majority of the precincts' voters." *Id.* at 15a.

4. On September 30, 1996, the United States Department of Justice notified the Commissioners Court that it had received information that Dallas County had changed its method for selecting election judges in 1995 and 1996, and that those changes had not been precleared under Section 5. J.S. App. 36a-37a. The Department of Justice stated that the changes were "legally unenforceable without Section 5 preclearance," and asked the County to submit the changes for preclearance. *Id.* at 37a. Dallas County did not comply with the request.

5. On October 3, 1996, appellants, African-American and Hispanic voters who had served as election judges in Dallas County but who would not be reappointed as a result of the Commissioners Court's September 3, 1996, order, filed their original complaint. They alleged that the August 1995 and September 1996 changes in the method of selecting election judges "constitute changes affecting voting within the meaning of Section 5" that had not been precleared as required by Section 5, and that failure to obtain preclearance "renders the voting changes legally unenforceable" until preclearance is obtained. Compl. ¶¶ 12, 13, 15. Appellants asked the three-judge court to declare that "the changes in the method used

to select election judges constitute changes affecting voting within the meaning of Section 5"; to enjoin appellees from conducting any future elections using any method that has not been precleared; to order "that the selection of election judges in the 1996 elections be conducted using the last legally enforceable method of selecting election judges in Dallas County, Texas," or alternatively, the Presidential precinct method as an interim measure, pending preclearance of any other method; and to grant such further relief "as the interest of justice may require." Compl. ¶ 16.

On October 8, 1996, after the Commissioners Court issued its order rescinding prior methods for selecting election judges, appellees moved to dismiss the original complaint on mootness grounds, arguing that the county had "abandoned the use of any formula or procedure that has not been precleared and is relying entirely on section 32.002 of the Election Code, which has received Section 5 preclearance." Br. in Supp. of Defs' Suggestion of Mootness 4. On October 10, appellants amended their complaint to allege that the method adopted in the Commissioners Court's October 1996 order, whereby only Republicans were appointed election judges and no judges were appointed in some precincts, also violates Section 5. Amended Compl. ¶¶ 12, 13. Appellants also filed an amended motion for a preliminary injunction to prevent appellees from implementing any unprecleared changes in the practices or procedures used to select election judges for future elections. In opposing that motion, appellees did not contest that Section 32.002 is a voting practice or procedure within the meaning of Section 5. Br. in Opp. to Pltfs' Second Preliminary Injunction Applic. 5. They contended, however, that

the statute set forth the only "practice or procedure" requiring preclearance under Section 5. *Id.* at 5-12.

6. On October 18, 1996, a three-judge court denied appellants' motion for injunctive relief. J.S. App. 1a-4a. The court concluded that the Department of Justice had precleared Section 32.002, *id.* at 2a, and, in so doing, had "precleared the process for selecting election judges in Texas," *id.* at 3a. That process, concluded the court, "confers discretionary authority on the Commissioners Court to appoint election judges, and * * * the exercise of th[at] discretion is not subject to preclearance." *Id.* at 2a. The court held that there was no "change" requiring preclearance, noting the "constancy" among the plans in their reliance on "partisan affiliation as an informing principle." *Id.* at 3a-4a. The court expressly refrained from making any finding about the methods in effect on November 1, 1972, the coverage date for Dallas County: "[W]e do not find that any methods in effect prior to 1982 have adequately been presented. We therefore decline to consider them in reaching our decision." *Id.* at 2a n.*. On October 18, 1996, appellants appealed from the order denying their motion for a preliminary injunction. *Id.* at 9a.

On February 7, 1997, the three-judge court granted appellees' motion to dismiss appellants' complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, stating that "the decision of the three-judge court denying plaintiffs' application for a preliminary injunction establishes that plaintiffs have failed to state a § 5 claim on which relief can be granted." J.S. App. 66a (No. 96-1389). On February 21, appellants appealed from the dismissal of their complaint. *Id.* at 70a-71a.

DISCUSSION

The order dismissing appellants' complaint (No. 96-1389) should be summarily vacated and remanded for further consideration. Under this Court's precedents, the three-judge court committed reversible error both in concluding that the Attorney General precleared Dallas County's procedures for selecting election judges when he precleared the 1985 recodification of the Texas Election Code, and in holding that a change in the specific standard, practice, or procedure used to appoint election judges is not subject to Section 5 preclearance.

Plenary review is not appropriate, however, on the question whether there has, in fact, been a change in voting practices or procedures subject to Section 5. Although appellees argue that the Commissioners Court's October 8, 1996, order resulted in a return to the practices in effect on November 1, 1972, Dallas County's Section 5 coverage date, the three-judge court expressly found that the record was inadequate to determine any methods that were in effect before 1982. J.S. App. 2a n.*. If, on remand, the three-judge court concludes, based on a more developed record, that the practices or procedures adopted by the Commissioners Court on October 8, 1996, are not, in fact, those that were in effect on November 1, 1972, the court must hold that the October 1996 order implemented a change subject to Section 5 preclearance. If, however, the three-judge court concludes that the practices in effect since October 8, 1996, are, in fact, those that were in effect in November 1972, it must then determine whether reversion to those methods constitutes a "change" that is subject to Section 5 preclearance. As that issue is merely

theoretical on the current record, this Court's consideration of it would be premature. The Court therefore should vacate and remand the order dismissing the appeal (No. 96-1389) and dismiss as moot the order denying appellants' motion for a preliminary injunction (No. 96-987).

1. The district court erred in dismissing appellants' complaint under Section 5 of the Voting Rights Act of 1965. Its conclusion that the Attorney General's 1985 preclearance of revisions to the Texas Election Code precleared changes in the standards, practices, or procedures by which the Commissioners Court appoints election judges is in conflict with this Court's precedents requiring that proposed changes in voting requirements be specifically identified in Section 5 submissions. Its holding that changes in the practices or procedures for selecting election judges are not subject to Section 5's preclearance requirements disregards this Court's precedents establishing that actions taken pursuant to a precleared statute must themselves be precleared if they result in a change to a voting standard, practice, or procedure.

a. The district court erred in ruling that the Attorney General precleared Dallas County's procedures for selecting election judges when he precleared Section 32.002. This Court consistently has interpreted Section 5's preclearance provision to "requir[e] that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for [her] consideration pursuant to the Act." *McCain* v. *Lybrand*, 465 U.S. 236, 249 (1984) (quoting *Whitley* v. *Williams*, 393 U.S. 544 (1969)); *United States* v. *Sheffield Bd. of Comm'rs*, 435 U.S.

110, 136 (1978). A State's Section 5 submission must "identify with specificity each change that it wishes the Attorney General to consider." *Clark* v. *Roemer*, 500 U.S. 646, 658 (1991). Applying a "presumption that 'any ambiguity in the scope of [a] preclearance request' must be construed against the submitting jurisdiction," *id.* at 659 (quoting *McCain* v. *Lybrand*, 456 U.S. at 257); accord *Young* v. *Fordice*, 117 S. Ct. 1228, 1237 (1997), this Court consistently has held that the Attorney General's preclearance applies only to those changes in voting that a jurisdiction has specifically identified as a change, and that the Attorney General has, in fact, reviewed, see, *e.g.*, *Lopez* v. *Monterey County*, 117 S. Ct. 340, 344-345 (1996) (Attorney General's preclearance of 1983 law concerning consolidation of judicial districts did not preclear previous consolidation ordinances); *Clark* v. *Roemer*, 500 U.S. at 657-658 (preclearance of change in number of judges in judicial district did not preclear prior changes not specifically identified); *McCain* v. *Lybrand*, *supra* (Attorney General's lack of objection to amendment of statute did not ratify voting changes embodied in initial enactment of same statute).[2]

Under this precedent, the court below clearly erred in ruling that, by preclearing the 1985 voting changes under the Texas Election Code, "the Department of

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[2] Consistent with this precedent, the Attorney General's regulations require that, "[i]f the change affecting voting" is not readily apparent on the face of the documents, the submission must include "a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and [the] proposed situation with respect to voting." 28 C.F.R. 51.27(c).

Justice precleared the process for selecting election judges in Texas." J.S. App. 3a. In its Section 5 submission, Texas expressly advised the Attorney General that the revision to Section 32.002 merely "clarif[ied] the beginning date and duration of the appointment of an election judge for a county election precinct." J.S. App. 41a. Other than requiring that each commissioners court consider recommendations by the county clerk, the language of Section 32.002 does not identify any change in the practices or procedures that commissioners courts are to use in selecting election judges. It does not prescribe whether or how previous election results should be taken into account, nor does it specify that commissioners courts should use the Presidential precinct method, the U.S. Senatorial precinct method, or the Republican precinct method—the procedures that Dallas County used between 1985 and 1996.[3]

Further, the Attorney General's letter preclearing those voting changes that Texas had identified did not indicate that the Department of Justice had reviewed or approved the general practice of using success in past elections as a standard for appointing election judges, or the specific practice of relying on the precinct level results of a particular election. J.S. App. 47a-52a. In fact, the Attorney General emphasized that state and local officials remained responsible for seeking preclearance of any changes affecting voting implemented as a result of the precleared provisions.

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[3] The State's 1985 submission identified several other provisions in the Texas Election Code that were being revised or recodified, see J.S. App. 41a-42a, but, as with Section 32.002, none of those sections identifies any method that a commissioners court is to use to appoint election judges.

Id. at 48a. Therefore, the three-judge court's conclusion that the Attorney General precleared the Commissioners Court's use of "partisan affiliation" to appoint election judges is plainly incorrect.[4]

b. The district court also held that the Commissioners Court's successive changes in its method for selecting election judges—including the Presidential precinct method, the Senatorial precinct method, and the "appointment of Republicans across the board"—do not constitute "change[s] in election practice[s] or procedure[s] contemplated by § 5 of the Voting Rights Act." J.S. App. 3a. It reasoned that, because Section 32.002 "left to the local political government" the discretion to select election judges, changes reflecting "shifting accommodations of partisan power" are not reviewable as changes under Section 5. *Ibid.* The district court's reasoning and conclusion are incorrect.

The district court appeared to conclude that, where a jurisdiction has discretion with respect to a voting standard, practice, or procedure, the exercise of that discretion is not reviewable. That conclusion is wrong with respect to Dallas County's changes to its

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[4] That conclusion constitutes reversible error, whether the error is legal or factual. See *McCain* v. *Lybrand*, 465 U.S. at 257-258 (to the extent that district court's conclusion that Attorney General precleared certain changes reflected failure to resolve ambiguities against submitting jurisdiction, it was legal error; to the extent that conclusion rested on factual finding, it was clearly erroneous); see also *Young* v. *Fordice*, 117 S. Ct. at 1233, 1239 (disagreeing with district court's conclusion that Attorney General had precleared certain voting changes, without characterizing lower court's error as legal or factual); *Clark* v. *Roemer*, 500 U.S. at 658 (district court's conclusion that Attorney General had precleared certain voting changes reflected "factual and legal errors").

methods for selecting election judges. Actions taken pursuant to a precleared statute must themselves be precleared if they produce a change in a voting standard, practice, or procedure. See, *e.g.*, *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985) (even "an administrative effort to comply with a statute that had already received preclearance" required separate preclearance when it changed the qualifying period for an election); *Blanding* v. *DuBose*, 454 U.S. 393 (1982) (per curiam) (after Attorney General had precleared South Carolina statute giving counties discretion to select form of local government and to choose between at-large and single-member districts, county's exercise of that discretion was also subject to preclearance); see also *United States* v. *Texas*, No. SA-85-CA-2199 (W.D. Tex. Aug. 1, 1985) (three-judge court) (although existing state law permitted Governor to call emergency special elections, if date of election differed from date otherwise prescribed by statute, emergency election plan was subject to Section 5 preclearance), aff'd mem., 474 U.S. 1078 (1986) (J.S. App. 53a).

This is not a case in which the simple "ebb and flow of political power," J.S. App. 3a, changed the composition of the election judges, as would have occurred, for example, if the Commissioners Court had retained the Presidential precinct method, under which the election results favored the Democrats in one election and the Republicans in the next. Rather, in the exercise of its acknowledged discretion to consider partisan affiliation in appointing election judges, the Commissioners Court enacted several successive changes in the practices and procedures it used for doing so. First, when its procedures expressly relied on election results, it changed the election (presiden-

tial to senatorial) on which it relied. See *id.* at 13a. Next, it changed the manner in which it considered those election results (from considering the results in all precincts to considering the results only in precincts where Republicans prevailed). *Id.* at 13a-14a. Finally, in October 1996, when it rescinded its prior orders, it disavowed any express reliance on past election results. *Id.* at 14a, 22a. Because each of those changes in Dallas County's method of selecting election judges is a change affecting voting within the meaning of Section 5,[5] each is subject to preclearance.

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[5] The dispute in this case is not whether procedures affecting election judges are procedures that affect voting. Appellees concede that "the statute creating the position of election judges is an election procedure requiring section 5 preclearance." Mot. to Aff. 10. See 42 U.S.C. 1973b(a)(1)(F)(iii) (to exempt itself from preclearance requirements, a covered jurisdiction must demonstrate that it has "engaged in * * * constructive efforts, such as * * * the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process"); H.R. Rep. No. 227, 97th Cong., 1st Sess. 14 (1981) (listing "refusal to appoint minority registration and election officials" among "numerous practices and procedures which act as continued barriers to registration and voting").

The election judges' performance of their duties affects voting and therefore "bear[s] a direct relation to voting itself." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 510 (1992). They have broad "responsib[ility] for the management and conduct of the election at the polling place of the election precinct that [they] serv[e]." Tex. Elec. Code Ann. § 32.071 (West 1986). They are authorized to prevent violations of the election code and issue arrest warrants, *id.* § 32.075; to determine when ballots may be counted, *id.* § 65.002(b); and to select the clerks who assist in the conduct of the election, *id.* § 32.031. As election officers, election judges are entrusted to assist voters who are disabled or illiterate, *id.* § 64.031; to decide if

The district court based its dismissal of appellants' Section 5 claim in part upon its finding that the "informing principle" underlying each method was "partisan affiliation." J.S. App. 3a. To the extent that the district court delved into the purpose behind Dallas County's change from one procedure to another (see Opp. to Mot. to Aff. 4-6), the district court plainly "misconceived the permissible scope of its inquiry into appellants' allegations." *Perkins* v. *Mathews*, 400 U.S. 379, 383 (1971) (citing *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969)). This Court consistently has held that, in a challenge to a jurisdiction's failure to obtain preclearance under Section 5, "[t]he three-judge district court may determine only whether § 5 covers a contested change, whether § 5's approval requirements were met, and, if the requirements were not satisfied, what temporary remedy, if any, is appropriate." *Lopez* v. *Monterey County*, 117 S. Ct. at 349 (citing *City of Lockhart* v. *United States*, 460 U.S. 125, 129 n.3 (1983); *United States* v. *Board of Supervisors of Warren County*, 429 U.S. 642, 645-647 (1977) (per curiam); *Perkins* v. *Mathews*, 400 U.S. at 385; *Allen* v. *State Bd. of Elections*, 393 U.S. at 558-559). Consideration of the

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voters possess the requisite qualifications to vote, *id.* § 63.001 (& Supp. 1997); and to determine which irregularly marked ballots may be counted, *id.* § 65.009. Certainly, when the Commissioners Court adopted a method of selecting election judges that resulted in leaving the position vacant in many predominantly Hispanic and African-American precincts, see J.S. App. 15a, that was a change to a procedure affecting voting that had a "potential for discrimination." *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. at 181.

purpose or effect of the change is "expressly reserved" for the United States District Court for the District of Columbia or the Attorney General. *Ibid.* (quoting *Perkins* v. *Mathews*, 400 U.S. at 385). Under that established precedent, the purpose of the changes implemented by the Commissioners Court had no place in the district court's Section 5 analysis. If, as it appears, the district court relied on that purpose as a basis for concluding that the voting changes were not covered by Section 5, that erroneous reliance constitutes yet another ground for reversing that aspect of its judgment.

c. Appellees' final contention cannot be conclusively resolved on the current record. Appellees contend that, because the Commissioners Court, through its October 8, 1996, order, voluntarily reverted to the practices in force or effect on November 1, 1972, this Court should affirm the judgment below. Mot. to Aff. 14-19.

The record in this case does not disclose, however, whether the Commissioners Court actually has reverted to practices that were in force or effect in 1972. Rather than allow discovery on that question, the three-judge court "decline[d] to consider" any methods in effect before 1982. J.S. App. 2a n.*.[6] If, on

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[6] The court's refusal to allow discovery on that factual question was itself error. A court may dismiss a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spaulding*, 467 U.S. 69, 73 (1984) (citing *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)). Appellants' amended complaint alleged that Dallas County's implementation of its October 8, 1996, order resulted in changes in procedures requiring preclearance under Section 5, which took effect in

remand, a more fully developed record reveals that the practices in effect on October 8, 1996, are not in fact those that were in force or effect in November 1972, then the district court would have to find that the newly enacted procedures are a change that requires Section 5 preclearance. The district court could then resolve this case by enjoining Dallas County from enforcing those procedures until it has obtained a declaratory judgment from the United States District Court for the District of Columbia or preclearance from the Attorney General, *Lopez* v. *Monterey County*, 117 S. Ct. at 347, and by considering whether other relief is necessary to address any continuing effects of the implementation of the unprecleared changes, *Perkins* v. *Mathews*, 400 U.S. at 396-397.

If, on the other hand, the amplified record discloses that Dallas County has returned to the very practices that were in force or effect on November 1, 1972, the district court would need to address unresolved questions about the effect of unprecleared changes on the Section 5 preclearance process. Appellees contend that a jurisdiction's reversion to the practice in effect on the coverage date does not implicate Section 5, which requires preclearance only for a voting practice "different from that in force or effect" on the coverage date. Mot. to Aff. 14-18. Appellants assert that, because a reversion to a practice in force or effect on the coverage date would constitute a change from more recent, but unprecleared, practices in force

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Dallas County on November 1, 1972. Amended Compl. ¶ 12. Accordingly, the district court should have denied the motion to dismiss and allowed both parties to take discovery and present evidence of Dallas County's practices for appointing election judges from November 1, 1972, until 1983, when the County changed to the Presidential method.

or effect, that reversion must be precleared. J.S. 24-28.

While the text of Section 5 requires preclearance only for standards, practices, or procedures that are "different from th[ose] in force or effect on [the date of coverage]," 42 U.S.C. 1973c, the statute does not address the effect of intervening changes, either precleared or not. Generally, if a jurisdiction has precleared a change from the voting practice in force or effect on the coverage date, that new practice becomes the "baseline standard" for determining whether any future practices or procedures are " 'different' enough * * * to require preclearance." *Young* v. *Fordice*, 117 S. Ct. at 1234 (citing *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 495 (1992)). It is as yet unresolved, however, whether a voting change that has been in force or effect, but not precleared, may be considered in evaluating future changes under Section 5, even though the unprecleared change may not be enforced.[7]

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[7] *White* v. *Dougherty County Board of Education*, 579 F. Supp. 1480 (M.D. Ga. 1984) (three-judge court), raised the question whether a covered jurisdiction's change in its policies concerning unpaid leaves for employees who sought to perform the duties of an elected office was subject to Section 5. The three-judge court concluded that the defendant school board had not, in fact, changed its policies in this regard, so there was no change to preclear. *Id.* at 1493. The district court therefore did not reach the question whether the county's reversion to a practice that predated coverage under Section 5 is a change that must be precleared. *Ibid.* Plaintiffs appealed, and this Court summarily affirmed. 470 U.S. 1067 (1985). In a brief filed at the Court's invitation, the United States stated that, if the jurisdiction had returned to the practice in effect on the coverage date, that decision would not be subject to Section 5. See Brief for the United States at 10-15, *White*,

In our view, resolution of that question is not warranted on the basis of the current record. Rather, this case is procedurally analogous to *Berry* v. *Doles*, 438 U.S. 190 (1978) (per curiam). In *Berry*, the Court summarily vacated and remanded the district court's denial of appellants' request to set aside results of an election held under an unprecleared change to Georgia's voting laws. This Court stated that the difficult issue of the propriety of the relief could be avoided if Georgia's application under Section 5 for preclearance of a voting change was granted. If preclearance was denied, the plaintiffs would be free to request specific injunctive relief. *Id.* at 193. If preclearance was granted, the case would be at an end, and the necessity to address difficult legal issues would be avoided. *Ibid.*; accord *Statewide Reapportionment Advisory Comm.* v. *Theodore*, 508 U.S. 968 (1993) (summarily vacating district court's decision and remanding for further proceedings to determine if the court's redistricting plans complied with Section 2 of Voting Rights Act); see also *Lopez* v. *Monterey County*, 117 S. Ct. at 347 (issues concerning scope of Section 5 coverage to be considered in first instance by district court on remand); *Reno* v. *Bossier Parish School Bd.*, No. 95-1455 (May 12, 1997), slip op. 14-15 (vacating and remanding in part in Section 5 case to allow district court to consider evidence of redistricting plan's dilutive impact).

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supra (No. 83-1868). Should the district court in this case need to reach appellants' claim that Dallas County's reversion to the practice it used on the date of coverage should be precleared, or should this Court note probable jurisdiction, the United States will address whether the circumstances in this case warrant a different conclusion than that advocated in *White*.

As in *Berry*, this case may be easily disposed of once the district court determines whether Dallas County actually has reverted to the same practice it used in 1972. If it has not, the new procedure is subject to Section 5 and must be precleared, and "the matter will be at an end." 438 U.S. at 193. In light of the unresolved factual questions, however, plenary consideration of that issue would be inappropriate at this time. The Court should summarily vacate that aspect of the judgment and remand the case to the three-judge court for appropriate consideration of the procedures actually in effect now and in November 1972.

2. The three-judge court's dismissal of appellants' complaint moots the appeal from the order denying their motion for a preliminary injunction. On February 7, 1997, when the district court dismissed appellants' complaint, the court's earlier denial of appellants' preliminary injunction merged into the final judgment of dismissal. Thus, the appeal from the order denying appellants' preliminary injunction should be dismissed as moot. *Shaffer* v. *Carter*, 252 U.S. 37, 44 (1920) (appeal from denial of interlocutory application for injunction becomes merged in final decree and should be dismissed as moot); accord *Smith* v. *Illinois Bell Tel. Co.*, 270 U.S. 587, 588-589 (1926) (appeal from order granting interlocutory injunction is merged into final decree).

CONCLUSION

With regard to the appeal from the order dismissing the complaint (No. 96-1389), this Court should summarily vacate the judgment and remand the case to the district court for further proceedings. If the case is not summarily vacated, this Court should note probable jurisdiction. The appeal from the denial of appellants' motion for a preliminary injunction (No. 96-987) should be dismissed as moot.

Respectfully submitted.

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MAY 1997

Supreme Court, U.S.
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No. 96-1389

In The

Supreme Court of the United States

October Term, 1996

B.C. FOREMAN, IDA CLARK, OTIS TARVER, DOMINIC DE LA CRUZ, LOUIS DAVIS, and MANDY PESINA,

Appellants,

v.

DALLAS COUNTY, TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, Dallas County Judge; JIM JACKSON, JOHN WILEY PRICE, MIKE CANTRELL, and KENNETH MAYFIELD, Dallas County Commissioners; and BRUCE SHERBET, Elections Administrator of Dallas County, Texas,

Appellees.

On Appeal From The United States District Court For The Northern District Of Texas

SUPPLEMENTAL BRIEF

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MEMORANDUM OF APPELLEE SUGGESTING THAT THE CASE MAY BE MOOT

Dallas County files this memorandum pursuant to Supreme Court Rule 18.10 to bring the Court's attention to recent legislation passed by the Texas Legislature that may render this case moot. *Board of License Commissioners of the Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) ("continuing duty [of counsel] to inform the Court of any development which may conceivably affect the outcome"), *quoting and citing Fusari v. Steinberg*, 419 U.S. 379, 390-91 (1975) (Burger, C.J., concurring).

Two fundamental issues are presented in this appeal:[1]

> (1) Whether the various actions of the Dallas County commissioners court in considering political party affiliation when deciding whom

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[1] Although the parties and the amicus have expressed the issues presented in different language, there seems to be no question that a fundamental issue is whether the actions of the commissioners court in using different methods to determine whom it would appoint were practices, standards, or procedures within the meaning of the Voting Rights Act. The United States' recently submitted argument simply assumes that the answer is "yes". *See* Amicus Brief for the United States at 3-4, 8 (stating, without discussion, that appointment methods were "procedures"). Dallas County believes the issue is more subtle and that there is a continuum ranging from the statutory provision indicating how election judges are to be appointed, to the methodology by which the commissioners determine which names will be on the list of possible appointees, to the ultimate appointment of specific individuals. The issue is where along that continuum the line can be drawn that defines what is a section 5 practice, standard, or procedure and what is not. *See* Motion to Affirm (96-1389) at 7-11.

> to appoint as presiding election judges were standards, practices, or procedures within the meaning of section 5 of the Voting Rights Act, 42 U.S.C. § 1973c; and
>
> (2) If so, whether the commissioners court's abandonment of the challenged, but unprecleared methodologies, and its ultimate appointment of all presiding election judges from a single political party represented a change in a standard, practice, or procedure.

It seems clear that there is an insufficient factual basis to decide the second question as the record does not reflect the practice in effect in Dallas County on November 1, 1972, which is a potentially critical date for determining the baseline against which any subsequent practice must be measured to determine if there is a difference between the two. *E.g.*, Amicus Brief of the United States at 16-17; Motion to Affirm at 23-25. The record is presumably sufficient to address the first issue; however, recent action of the Texas Legislature may make both questions moot.

The first issue arises from the Dallas County commissioners court's appointment of presiding election judges pursuant to various methods ranging from an allocation of appointees on the basis of presidential election returns, to an allocation based on senatorial election returns, to an allocation of all positions to members of a single political party. As section 32.002, TEX. ELEC. CODE, vested the commissioners court with the discretion to determine whom to appoint, the commissioners court had clear authority under state law to adopt any one of these methods.

House Bill No. 331, recently passed by the Texas Legislature, removes that discretion and requires the commissioners court to allocate appointments pursuant to a strict formula. Under that statute, relevant portions of which are attached as an appendix to this memorandum, the county chairs of the major political parties will submit lists of potential appointees for all county election precincts. The presiding judge for a precinct is required to come from the party that carried the precinct in the last gubernatorial election. The alternate judge is required to come from the party that received the second highest number of votes in the precinct in that election. For each precinct, the commissioners court must appoint the first person who meets the qualifications for appointment on the list submitted by the relevant county chair. Thus, election judges will be allocated among the parties by a set formula prescribed by statute. The conduct that is challenged in this case and that is sought to be enjoined will no longer be possible.[2] The entire case will accordingly be moot. *See, e.g., United States Department of Justice v. Provenzano*, 469 U.S. 14, 15 (1984) (intervening passage of legislation mooted issue); *County of Los Angeles v. Davis*, 440 U.S. 625, 631-33 (1979) (case moot where complained-of actions were abandoned and where there was no reasonable expectation that the challenged actions would recur).

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[2] As both the new and existing statute contemplate appointment of election judges in July and the new statute has an effective date of September 1, 1997, it is possible that a new set of judges will be appointed under the old system. Any appointments after September 1, however, should be governed by the new statute.

It is important to note that the legislation is not yet effective. While House Bill No. 331 has been passed by both houses of the Texas Legislature, it has not yet been signed by the Governor. Under the Texas Constitution, the Governor has until June 22, 1997 to sign the bill, to veto it, or to permit it to become law without his signature. Assuming the bill is approved by the Governor, it will represent a change in chapter 32, TEX. ELEC. CODE, that must be precleared under section 5 of the Voting Rights Act. The standard time for preclearance is 60 days from submission, although it is possible for the Attorney General to have a second 60-day period for her review. 28 C.F.R. §§ 51.37 and 51.42. In any event, it will be known in a relatively short period of time whether the legislation has become effective and will thus cause this case to be moot.

Dallas County is aware that, where there is any uncertainty whether a post-judgment development has rendered an appeal moot, the Court may remand the case to the district court for consideration of mootness. *E.g., Vitek v. Jones*, 436 U.S. 407 (1978). In this instance, if House Bill No. 331 becomes law and is precleared by the Attorney General, there is little doubt that this case will be moot. Conversely, if House Bill No. 331 does not become law, or is not precleared, the controversy will remain precisely in the form now before this Court. Accordingly, there is nothing to be added by the district court on a remand to consider mootness, the only result of which would be delay in again presenting this appeal to this Court.

For these reasons, Dallas County, appellee, suggests that the issues raised in this appeal may shortly become

moot and requests that the Court defer consideration of the issue pending determination of whether House Bill No. 331 will be approved by the Governor and precleared by the Attorney General. The answers to both questions should be apparent by or shortly after the beginning of the Court's 1997 term.

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APPENDIX

HB 331

AN ACT

relating to certain election processes and procedures.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

* * *

SECTION 8. Sections 32.002(a) and (b), Election Code, are amended to read as follows:

(a) The commissioners court [~~,~~] at its July term [~~each year,~~] shall appoint the election judges for each regular county election precinct.

(b) Judges appointed under Subsection (a) serve for a term of one year beginning on August 1 following the appointment, *except that the commissioners court by order recorded in its minutes may provide for a term of two years.*

SECTION 9. Sections 32.002(c) and (d), Election Code, are amended to read as follows:

(c) *The presiding judge and alternate presiding judge must be affiliated or aligned with different political parties, subject to this subsection. Before July of each year, the county chair of a political party whose candidate for governor received the highest or second highest number of votes in the county in the most recent gubernatorial general election shall submit in writing to the commissioners court a list of names of persons in order of preference for each precinct who are eligible for appointment as an election judge. The commissioners court shall appoint the first person meeting the applicable eligibility requirements from the list submitted in compliance with this subsection by the party with the highest number of votes in the*

precinct as the presiding judge and the first person meeting the applicable eligibility requirements from the list submitted in compliance with this subsection by the party with the second highest number of votes in the precinct as the alternate presiding judge. The commissioners court may reject the list if the persons whose names are submitted on the list are determined not to meet the applicable eligibility requirements. If the list is rejected, the appointment shall be made for the full term in accordance with the same procedures provided for the filling of vacancies under Subsection (d) based on the time of the rejection instead of the time that a vacancy occurs. If a list of names is not submitted in compliance with this subsection, the commissioners court shall appoint an eligible person who is affiliated or aligned with the appropriate party, if available.

(d) The commissioners court shall fill a vacancy in the position of election judge for the remainder of the unexpired term. An appointment to fill a vacancy may be made at any regular or special term of court. *Not later than 48 hours after the county clerk becomes aware of a vacancy, the county clerk shall notify the county chair of the same political party with which the original judge was affiliated or aligned of the vacancy. Not later than the fifth day after the date of notification of the vacancy, the county chair of the same political party with which the original judge was affiliated or aligned shall submit to the commissioners court in writing the name of a person who is eligible for the appointment. If a name is submitted in compliance with this subsection, the commissioners court shall appoint that person to the unexpired term. If a name is not submitted in compliance with this subsection, the commissioners court shall appoint an eligible person who is affiliated or aligned with the same party, if available.*

~~[(d) The county clerk shall recommend a presiding judge and an alternate judge for each precinct and shall submit a list of the recommendations to the commissioners court. The clerk shall also recommend an appointee for each unexpired term. The court shall consider the clerk's recommendation before making an appointment.~~]

SECTION 10. Section 32.007, Election Code, is amended by amending Subsections (a) and (b) and adding Subsection (f) to read as follows:

(a) If neither the presiding judge nor the alternate presiding judge can serve in an election and their inability to serve is discovered so late that it is impracticable to fill the vacancy in the normal manner, the presiding officer of the appointing authority or the authority if a single officer shall appoint a replacement judge to preside at the election, *subject to Subsection (f)*. If the appointing authority is unavailable, the authority responsible for distributing the supplies for the election shall appoint the replacement judge.

(b) If a person authorized to act as presiding judge is not present at the polling place at the time for opening the polls, on receiving information of the absence, the authority authorized to appoint a replacement under Subsection (a) shall investigate the absence and appoint a replacement judge, *subject to Subsection (f)*, unless the authority learns that a previously appointed judge will immediately report for duty.

(f) A person who is appointed as a replacement for a judge originally appointed under Section 32.002 must be affiliated or aligned with the same political party as was the original judge, if possible.

SECTION 11. Section 32.051, Election Code, is amended by amending Subsection (a) and adding Subsection (e) to read as follows:

(a) Except as provided by Subsection (b) *or (e)*, to be eligible to serve as a judge of an election precinct, a person must:

(1) be a qualified voter of the precinct; *and*

(2) for a regular county election precinct for which an appointment is made by the commissioners court, satisfy any additional eligibility requirements prescribed by written order of the commissioners court.

(e) In a regular county election precinct for which an appointment is made by the commissioners court and in which a political party's candidate for governor received more than 85 percent of the vote in the most recent gubernatorial general election, the alternate presiding judge may be a qualified voter of another precinct in the county.

SECTION 12. Subchapter C, Chapter 32, Election Code, is amended by adding Section 32.0552 to read as follows:

Sec. 32.0552. INELIGIBILITY OF PERSON CONVICTED OF ELECTION OFFENSE. A person is ineligible to serve as an election judge or clerk in an election if the person has been finally convicted of an offense in connection with conduct directly attributable to an election.

* * *

SECTION 79. This Act takes effect September 1, 1997.

Nos. 96-987 and 96-1389

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1996

B.C. FOREMAN, IDA CLARK, OTIS TARVER, DOMINIC DE LA CRUZ, LOUIS DAVIS, and MANDY PESINA,

Appellants,

v.

DALLAS COUNTY, TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, Dallas County Judge; JIM JACKSON, JOHN WILEY PRICE, MIKE CANTRELL, and KENNETH MAYFIELD, Dallas County Commissioners; and BRUCE SHERBET, Elections Administrator of Dallas County, Texas,

Appellees.

On Appeal from the United States District Court for the Northern District of Texas

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9 pp

TABLE OF CONTENTS

Page

I. TEXAS HOUSE BILL NO. 331 CANNOT MOOT THIS CASE. 2

II. UNLESS DALLAS COUNTY REVERSES COURSE AND SUBMITS TO THE PRECLEARANCE PROCESS, TEXAS HOUSE BILL NO. 331 MAY NOT BE PRECLEARED AND HENCE WILL NOT BECOME LEGALLY ENFORCEABLE AND CANNOT POSSIBLY MOOT THIS CASE. 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Church of Scientology v. United States, 506 U.S. 9 (1992) 3

Mills v. Green, 159 U.S. 651 (1895) 3

Upham v. Seamon, 456 U.S. 37 (1982) 4

Vitek v. Jones, 436 U.S. 407 (1978) 6

STATUTES

42 U.S.C. § 1973c ..... *passim*

Texas Election Code Ann. § 32.002 2

MISCELLANEOUS

Texas House Bill No. 331 ..... *passim*

In The

Supreme Court of the United States

October Term, 1996

Nos. 96-987 and 96-1389

B.C. FOREMAN, IDA CLARK, OTIS TARVER, DOMINIC DE LA CRUZ, LOUIS DAVIS, and MANDY PESINA,

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DALLAS COUNTY, TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, Dallas County Judge; JIM JACKSON, JOHN WILEY PRICE, MIKE CANTRELL, and KENNETH MAYFIELD, Dallas County Commissioners; and BRUCE SHERBET, Elections Administrator of Dallas County, Texas,

Appellees.

On Appeal from the United States District Court for the Northern District of Texas

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APPELLANTS' SUPPLEMENTAL BRIEF

Appellants file this Supplemental Brief in response to the Memorandum Of Appellee Suggesting That The Case May Be Moot [hereinafter "Mem."]. Appellee Dallas County has asked the Court to defer consideration of this case until October Term

1997 on the ground that a bill recently passed by the Texas Legislature "may" moot this case. Mem. at 1-2, 4-5. Texas House Bill No. 331, however, has not been signed by the Governor of Texas, has not become law, and has not been precleared under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. And even if the bill were promptly signed and precleared, it would *not* moot this case. Therefore, this Court should deny Dallas County's request for a delay.

I. TEXAS HOUSE BILL NO. 331 CANNOT MOOT THIS CASE.

Even if Texas House Bill No. 331 is signed by the Governor and promptly precleared by the Attorney General or the District Court for the District of Columbia, it will not moot this case. By its own terms, the bill would not take effect until September 1997. *See* Mem. at 4a (Section 79 of the bill) ("This Act takes effect September 1, 1997."). Dallas County election judges, whose selection and appointment are at issue in this case, are appointed by the Dallas County Commissioners Court in July, and their one-year terms commence on the following August 1. *See* Tex. Elec. Code Ann. § 32.002; *see also* Mem. at 1a. Therefore, absent relief from this Court or from the District Court on remand, Dallas County will be under no legal obligation to change its current, unprecleared method for selecting and appointing election judges until July 1998. In the meantime, an entirely new set of election judges, unaffected by the new bill, will be appointed and will preside over the fall 1997 and spring 1998 elections. Thus, even if the bill is promptly signed and precleared, it will not govern the selection and appointment of the next set of Dallas County election judges and will have no impact on elections held in Dallas County before August 1, 1998. Indeed, the County's brief concedes that the appointment of "a new set of judges . . .

under the old system" is "possible." Mem. at 3 n.2. But that scenario is not just "possible." It is certain.

Thus, if this Court summarily reverses the District Court's judgment[1] (or summarily vacates it and remands the case for further consideration in light of the position presently asserted by the Acting Solicitor General in his brief for the United States), the District Court on remand may grant appellants their requested declaratory and injunctive relief, and appellants may regain their posts as Dallas County election judges for the fall 1997 and spring 1998 elections. Because Texas House Bill No. 331, even if promptly signed into law and precleared, would not "make[] it impossible . . . to grant [appellants] 'any effectual relief,'" *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)), this case will not be moot.

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[1] Dallas County's latest brief actually bolsters appellants' arguments for summarily reversing the judgment below. *First*, the County now admits that its 1996 methods for selecting and appointing election judges simply "allocat[e] . . . all positions to members of a single political party." Mem. at 2; *see also* Br. for the United States as *Amicus Curiae* at 4 (referring to the September 1996 method as "the Republican precinct method"). *Second*, on top of its earlier concession that "the statute creating the position of election judge is an election procedure requiring section 5 preclearance," Mot. to Affirm at 7, Dallas County now concedes that a statute prescribing a set formula for allocating election judges among the political parties "must be precleared under section 5." Mem. at 4. *Third*, in a blatant attempt to run away from the obvious, Dallas County has now rephrased its second question presented to refer to the 1983 and 1995 changes as changes in "methodologies," even though the County's Motion to Affirm had referred to them as changes in "standard[s]" -- the very term Congress adopted in drafting Section 5. *Compare* Appellants' Br. in Opp'n to Appellees' Mot. to Affirm at 3 (arguing that these were changes in a "standard, practice, or procedure" within the meaning of Section 5) *with* Mot. to Affirm at i (implicitly conceding that point by calling them "standard[s]").

II. UNLESS DALLAS COUNTY REVERSES COURSE AND SUBMITS TO THE PRECLEARANCE PROCESS, TEXAS HOUSE BILL NO. 331 MAY NOT BE PRECLEARED AND HENCE WILL NOT BECOME LEGALLY ENFORCEABLE AND CANNOT POSSIBLY MOOT THIS CASE.

The assumption on which Dallas County's brief is premised -- that Texas House Bill No. 331 will actually be precleared -- is very much in doubt. And even Dallas County does not contend that the bill will moot this case if it is *not* precleared.

First, Texas House Bill No. 331 contains literally dozens of revisions to the Texas Election Code in addition to those reprinted in the appendix to the County's Memorandum. Preclearance could be denied if *any* of those revisions prove to be retrogressive. *See Upham v. Seamon*, 456 U.S. 37, 38 n.1 (1982) (*per curiam*).

Second, even the provisions of Texas House Bill No. 331 that are reprinted in the appendix to the County's Memorandum could be denied preclearance. Throughout this litigation, and dating back a quarter of a century, one fact has held firm: Dallas County has refused to submit to the Department of Justice *any* information regarding changes in its methods of selecting and appointing election judges. *See* Br. for the United States as *Amicus Curiae* at 5; J.S. at 6. Even now, as the County seeks to delay consideration of this case on mootness grounds, it continues to argue that it is free to ignore the Justice Department's requests. *See* Mem. at 1 n.1. If Dallas County continues to defy Section 5's command by refusing to provide federal authorities with information about the methods currently (and previously) in force or effect, it may be impossible for the Attorney General (or the District Court for the District of

Columbia) to establish a benchmark for measuring the effect of Texas House Bill No. 331 on Dallas County's minority voters. Because Dallas County encompasses one-ninth of the population of the State of Texas (and nearly one-fifth of its African-American population), it also may be impossible to gauge whether the bill is retrogressive to the State's minority citizens, taken as a whole. Thus, ironically, Dallas County's obstinacy may prevent the preclearance of the very bill that the County now argues may moot this appeal.

CONCLUSION

Accordingly, this Court should deny Dallas County's request to defer consideration of the case, and should summarily reverse the judgment of the District Court or, alternatively, note probable jurisdiction.[2]

Respectfully submitted,

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June 1997

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[2] For the reasons set forth in this Supplemental Brief, appellants agree with Dallas County's conclusion that it would be pointless to remand the case to the District Court for consideration of mootness. *See* Mem. at 4 (citing *Vitek v. Jones*, 436 U.S. 407 (1978)).

SUPREME COURT OF THE UNITED STATES

96–987 (5) B. C. FOREMAN ET AL. *v.* DALLAS COUNTY, TEXAS, ET AL.

96–1389 (7) B. C. FOREMAN ET AL. *v.* DALLAS COUNTY, TEXAS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Nos. 96–987 AND 96–1389. Decided June 27, 1997

PER CURIAM.

Texas by statute authorizes counties to appoint election judges, one for each precinct, who supervise voting at the polls on election days. In 1983 and several times thereafter, Dallas County changed its procedures for selecting these officials. Each of the new methods used party-affiliation formulas of one sort or another. After the most recent change in 1996, appellants sued the County and others in the United States District Court, claiming that §5 of the Voting Rights Act 79 Stat. 439, as amended, 42 U. S. C. §1973c, required that the changes be precleared.

A three-judge court held that preclearance was not required because the County was simply exercising, under the state statute, its "discretion to adjust [the procedure for appointing election judges] according to party power." App. to Juris. Statement 4a. The court apparently concluded that this "discretionary" use of political power meant that the various methods for selecting election judges were not covered changes under §5. The court also concluded that the Justice Department's preclearance of a 1985 submission from

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the State—the recodification of its entire election code—operated to preclear the County's use of partisan considerations in selecting election judges. The court denied injunctive relief, and later dismissed appellant's complaint pursuant to Fed. Rule Civ. Proc. 12(b)(6). Appellants have brought both of these rulings here.

We believe that the decision of the District Court is inconsistent with our precedents. First, in *NAACP* v. *Hampton County Election Comm'n,* 470 U. S. 166, 178 (1985), we held that even "an administrative effort to comply with a statute that had already received preclearance" may require separate preclearance, because §5 "reaches informal as well as formal changes." Thus, the fact that the County here was exercising its "discretion" pursuant to a state statute does not shield its actions from §5. The question is simply whether the County, by its actions, whether taken pursuant to a statute or not, "enact[ed] or [sought] to administer any . . . standard, practice, or procedure with respect to voting different from" the one in place on November 1, 1972. §5. The fact that the County's new procedures used political party affiliation as the selection criteria does not mean that the methods were exempt from preclearance.

Second, the State's 1985 submission (the recodification and a 30-page summary of changes to the old law) indicated that the only change being made to the statute concerning election judges was a change to "the beginning date and duration of [their] appointment." Thus, neither the recodified statute nor the State's explanations said anything about the use of specific, partisan-affiliation methods for selecting election judges. This submission was clearly insufficient under our precedents to put the Justice Department on notice that the State was seeking preclearance of the use of partisan affiliations in selecting election judges. See, *e.g., Young* v. *Fordice,* 520 U. S. ___, ___ (1997) (slip op., at 13–14); *Lopez* v. *Monterey Cty.,* 519 U. S. ___, ___ (1996) (slip op., at 5); *Clark* v. *Roemer,* 500 U. S. 646, 658–659 (1991).

Because the parties agree that the record is silent as to the procedure used by Dallas County for appointing election judges as of November 1, 1972, the date on which Texas became a covered jurisdiction under the Voting Rights Act, we cannot make a final determination here as to whether preclearance is in fact required. We therefore vacate the judgment of the District Court in No. 96–1389, dismiss the appeal from the District Court's interlocutory judgment in No. 96–987, see *Shaffer* v. *Carter,* 252 U. S. 37, 44 (1920), and remand for further proceedings.

It is so ordered.